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From the Editor

Race pervades our Kentucky criminal justice system. Criminal defense attorneys understand that horrible reality best. We see it. We feel it. We know it. While we may not be able to prove it very often to the level of sociological, moral or legal levels of proof, it is tangible. Lest anyone disagree about the real presence of racism, contemplate whether any defendant would want to have black skin at a trial or sentencing, instead of white skin.

KBA President Dick Clay calls us all to get on with confronting and correcting racism…now. De-fenders have an obligation to illuminate the realities of racism in Kentucky's criminal justice system. DPA is conduct a day of education for criminal de-fense practitioners on the Kentucky Racial Justice Act on October 27, 1998 in Louisville. Mark your calendars to attend.

On Our Cover: Kentucky's Public Defender Statute was substantially updated when Governor Paul Patton signed HB 337 into law. We have a better statute to represent our 100,000 clients with thanks to Representative Kathy Stein, Senator Ernesto Scorsone, and Public Advocate Ernie Lewis.

The Advocate

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. The Advocate educates criminal justice professionals and the public on its work, mission and values.

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

Persuading. Our nationally recognized week-long Litigation Practice Institute is adding two tracks, appellate & post-conviction, to the longstanding trial track. Space is limited. Apply early if you want to attend. There is no better place in Kentucky to learn how to be a more successful litigator.

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Stamping Out All Vestiges of Racism in Our Justice System

(Lexington, KY, June 15, 1998) To prepare for this speech, I read four speeches written by previous KBA presidents for delivery at this Annual Public Defender Conference. While each contains a different emphasis, they are all marvelously written tributes to the Department of Public Advocacy and its vital role in providing effective legal counsel to indigent defendants facing a loss of liberty. I cannot improve upon these speeches, and consequently will not elaborate upon the obvious: that what you do and the exceptionally professional manner in which you approach your task is fundamental to the rule of justice in this Commonwealth. Perhaps I should simply thank you and sit down.

If I did that, however, I would miss the opportunity to discuss with you the issue of perceptions of racism in Kentucky's justice system. This is an issue that has weighed heavily on my mind ever since a notable series of articles analyzing the issue appeared in the *Lexington Herald-Leader* in December, 1995 and in the *Courier-Journal* in January, 1996.

I realize that currently lawyers and investigative reporters are at the bottom rungs of the ladder in public image. You and I know, however, that these matters are inherently cyclical. Read Katharine Graham's recent autobiography, *Personal History*, and note her justifiable pride in the role the *Washington Post* played in breaking and then developing the Watergate story for the public. Read Taylor Branch's history of the civil rights movement: the Pulitzer winner, *Parting the Waters,* and the just published *Pillar of Fire.* You will develop a renewed appreciation and pride in the complementary roles that the investigative press and great lawyers play at times of constitutional crisis and infringement of liberties in this Country.

Facing the Different Standards of Justice

I was privileged to read Kentucky Bar President, Dick Clay's very fine speech to the Department of Public Advocacy given on Monday, June 15, 1998. It was a moving testimonial to the need for our profession to realistically face the different standards of justice which continue to plague Kentucky. Dick mentioned seeing Lee's *To Kill A Mockingbird*, starring Gregory Peck as Atticus Finch in 1956 in a segregated theater in my home town of Hopkinsville. I agree that it was a marvelous movie on the very nature of justice. It obviously made a strong impression on Dick which influenced his very fine speech pointing out the areas of racial insensitivity and overt racism which exists in Kentucky's justice system.

A generation earlier, as a young lawyer in Hopkinsville, I was distressed about the double standard of justice in murder cases. If you were African-American and were charged with killing a white person, justice was swift and severe resulting in a death sentence. If you were a white person accused of killing an African-American and could hire a good lawyer, you had a good chance of being acquitted or receiving a light sentence. If an African-American killed an African-American and the accused was needed to cut tobacco or harvest a crop, justice sometimes winked at the crime and allowed the defendant to be freed to work for the white farmer. This situation convinced me as Governor to support passage of the first Civil Rights Law south of the Mason-Dixon Line.

Dick Clay's article should be read by every Kentuckian and certainly by every member of the Bench and Bar in Kentucky.

- Former Governor Edward T. Breathitt, *Wyatt, Tarrant & Combs*
Louisville, Kentucky

It is the issue of fair and impartial justice for all citizens, regardless of color, (or for that matter sex, or any other of the myriad ways in which we label people), that I want to discuss with you tonight. I think back to my growing up years in Hopkinsville, a city that was in the early 1960s still profoundly segregated in spirit. It was there in the Sixth grade that some friends and I saw one of the most important movies ever produced on the very nature of justice--the production of Harper Lee's *To Kill A Mockingbird*, starring Gregory Peck as Atticus Finch. The irony is that we saw that inspiring production in Hopkinsville's Alhambra Theatre, which had separate drinking fountains and a balcony where men and women of African descent were at that time expected to sit. I don't mean to single Hopkinsville out. A series of ugly racial incidents, largely focused in the public high school, forced that beautiful and most southern of Kentucky cities to start coming to grips in the late 1960s and early 1970s with race-related issues. Hopkinsville, in many ways, now sets an example of how caring men and women of both races can, over time, create a climate where racial tensions diminish and understanding grows.

I guess you could say that the experiences of my youth alert me to perceptions of racism in our justice system, as do recently reported instances of hate across the nation in the form of church burnings and

murders where racism is an underlying motive. Witness what happened last week in Jasper, Texas, when some very twisted people took a 49-year-old black man named James Byrd Jr. for a ride. They then beat him senseless, chained him to the rear bumper and dragged him to his death, severing his head and an arm in the process. Yesterday's *New York Times* editorial page noted that malignant acts such as this do not shape the larger culture, but they stun it, and inform it. To paraphrase: "In Jasper, the community has rallied around a sheriff bent on color-blind prosecution of this lynching by pickup truck… The legacy of James Byrd, bless his soul, could be purifying and real, an affirmation that justice can be certain and equal in the former heartland of segregation."

Will We Be Able to Make Progress?

It was my distinct privilege, as a member of the Public Advocacy Commission, to hear the address by Dick Clay at the 26th Annual Public Defender Conference. It was probably the most thoughtful, hopeful, and inspiring address I have heard in recent years. Hooray! for Mr. Clay in making the issue of Racial Justice a cornerstone of his year as President of the Kentucky Bar Association. Having said that, what do I think will be the result of this effort? Mr. Clay initially considered the significant enactment of the Racial Justice Act, which applies only to death penalty cases. But the problem of racial justice goes far beyond death penalty cases. As Mr. Clay said, while studies have established no actual hard documentation of specific instances of racism in Kentucky courts, there is a significant, widespread perception of racial injustice. Dealing with a perception may very well be like dealing with a ghost.

It is a fact that there will be little measurable progress on this issue during Mr. Clay's short term in office. It is also a fact, that beginning the process through the study undertaken under the leadership of the Kentucky Supreme Court, the series of town hall meetings, and through passage of the Racial Justice Act has been very important. It is a fact that efforts made under Mr. Clay's leadership as President of the Kentucky Bar Association will be important in maintaining the momentum toward elimination of not only the fact of racial injustice, but just as importantly the perception that there is racism in Kentucky's courts. However, it is would be naïve to think that these efforts will suddenly transform our criminal justice system or the perceptions which people have about it.

Racism exists in the hearts and minds of mankind. It can only be eliminated in our system of justice when all persons, not just those engaged in the criminal process, open their hearts and minds. Mr. Clay's thoughtful and challenging address continues important dialogue on the issue. It is my hope that his address will be thoughtfully considered by all persons. His message is important.

- William R. Jones, Professor of Law Emeritus
Chase College of Law

It is against this personal and cultural backdrop that I consider one of the most significant enactments of the 1998 Kentucky General Assembly to be the Racial Justice Act. As you know, this legislation enables a defendant in a death penalty case to introduce statistics designed to show patterns of racial bias in other death penalty cases. The Act provides that the defendant "... shall state with particularity how evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case."

In the 1998 conference program for this 26th Annual Public Defender Education Conference, the following statement is made: "This success must be followed by vigorous advocacy by defenders. Training and brain storming on how to present effectively claims of prosecutorial racism in capital cases must occur."

I rather expect that similar discussions are underway among the Commonwealth Attorneys of Kentucky. In the future, the Racial Justice Act will be the bare bones upon which the flesh of well-advocated and carefully considered judicial opinions will be built. It will be fascinating to me, as a civil litigator, to see how this is interpreted in the future.

Again, the Racial Justice Act is a significant piece of legislation. But will this Act, despite its grand title, effectively eliminate perceptions of racism in Kentucky's justice system? No. There are many more issues to be addressed over time by all of us: Bench, Bar, participants in the system, and the press.

The newspaper articles I alluded to earlier provided impetus for the Act. Following those articles, a foundation on whose board I sit, The Norton Foundation of Louisville, along with the State Justice Institute, gave $88,500 to the Administrative Office of the Courts to fund a study on racism. A survey of 10,000 people, conducted by a Blue Ribbon Racial Bias Task Force, established no actual hard documentation of specific instances of racism in Kentucky courts. Nevertheless, the study documented significant, widespread perceptions of racial bias among those currently incarcerated for felonies, in misdemeanor courts, among small claims litigants and among domestic violence defendants.

Perception Exceeds Reality

I appreciate the opportunity to review the speech KBA President, Dick Clay made at your recent conference. Clay is correct that there is a perception that racism pervades our Criminal Justice system. This perception erodes public confidence in our legal institutions. However, as Clay mentioned, a recent study by the Norton Foundation along with the State Justice Institute found "no actual evidence of specific instances of racism in Kentucky Courts." I don't conclude from the study that all is well but I believe the perception exceeds the reality.

I fear the new "Racial Justice Act" with its reliance upon statistical evidence will result in a meaningless "battle of statisticians" and more appeals further eroding public confidence in the system. Any vestige of racism will be eliminated only by each of us as prosecutors or defense attorneys being conscious of the perception and making sure it is not a reality on a day by day

> individual case basis.
>
> - Phil Patton, Commonwealth Attorney
> Barren & Metcalfe Counties

Such perceptions cannot be permitted to undermine the trust and respect that men and women in this Commonwealth have for our courts. I publicly thank Chief Justice Stephens, Chief Justice-Elect Lambert and the other members of the Supreme Court for their leadership in undertaking this study, and for the series of town hall meetings that accompanied it. I am pleased to announce that the Kentucky Bar Association, in conjunction with the Kentucky Supreme Court, will sponsor a Justice Initiatives Conference in late 1999. It will address issues involving justice for the citizens of this Commonwealth, including but not limited to, areas where there has been overt, covert, or unintentional racial injustice. IOLTA has provided $30,000 for this conference. The planning for it, under the leadership of Bar Governor Steven Catron, will take place during my tenure as president of the KBA, and the conference will then take place shortly thereafter. The conference will be in direct response to a call by the National Conference for Chief Justices that such conferences take place in all 50 states. The conference will only be as good as its participants and the ideas they bring to the table. All too frequently, conferences result in wonderful talk, marvelous studies, but precious little, if any, action.

What are some of the areas where racial insensitivity or bias may be perceived to exist in Kentucky's justice system? In raising these questions for public discussion I want to emphasize that I am not casting blame. That would be a presumptuous exercise for me, as a civil lawyer with no experience in criminal law, to undertake. Perceptions do not always constitute reality. We do not serve justice by irresponsibly raising questions in a manner calculated to infer that they are real. I believe that we, as officers of the court, must examine at least the following areas:

- Are there perceived discrepancies in the setting of bail for black and white defendants, especially at the district court levels?
- If so, are these perceived discrepancies particularly pronounced for black and white women?
- Are there perceptions the police are not scrupulously fair in how they treat suspects? For example, are there perceptions that young black males in groups of two or more are singled out by police for uneven treatment? Do perceptions exist that black men and women are subjected to unfair pat-downs or searches and seizures?
- What about treatment by correctional officials and police while a defendant is in custody? Are there perceptions of race-based discrepancies in the guise of verbal or physical abuse?
- Are there perceptions of unfair treatment at the correctional level?
- Are all sentences, be they felony murders or not, handled without regard to race?

- Are there perceptions that the laws, particularly as they relate to drug offenders, are somehow not uniformly enforced?

- Are courthouse personnel, such as clerks, judges' secretaries and sheriffs, fair and even in their treatment of all participants in the system, regardless of race or status?

Our Work is Cut Out for Us

I have been asked to comment briefly on my friend Dick Clay's address to the Public Defender Conference. Specifically, Ed Monahan asked me to "better inform our readers of the reality Dick Clay is confronting." I have confronted the reality, myself, and our work is cut out for us.

First, I applaud and echo Dick's comments and exhortations, especially his conclusion that true liberty and justice for all can only be attained if all vestiges of racism, including the *perception* of racism, are erased.

As Jefferson County Commonwealth's Attorney, one of my greatest concerns was the perception of racism in our system. As lawyers we understand, for instance, that the *appearance* of impropriety can be as bad, or worse, as impropriety itself. The same is true with racism. Our system of justice relies not so much upon arrests and convictions as it does on faith and trust. In this democracy all of the police, judges and jails in the world could not preserve our most cherished principles if our citizens did not have faith in the system, or trust in its fair operation. Today, many lack that trust.

Respect for the system - the perception of justice - must begin at the top. The example bar leaders, prosecutors and defenders set will be followed, and closely observed. That is why, when a stronger Racial Justice Act was defeated in the 1996 legislature, I was surprised and disappointed to find myself alone among all of Kentucky's chief prosecutors in support of the law. Their arguments - that the law was unnecessary, that they did not institute racist prosecutions, that convictions would be more difficult to obtain - were well-made but missed the point. Lawmaking is often about message-sending, and the message sent by these bar leaders - those most intimately involved with the criminal justice system in our state - was the wrong one to those who already felt disenfranchised and uncom-fortably wary of the courts.

That the law eventually passed is a tribute to the work and perseverance of other bar and community leaders. This work must continue. Good luck.

- Marc Murphy, Jefferson County Commonwealth Attorney

The recent Racial Bias Task Force study examining the perceptions of court-users on the fairness of the Kentucky Courts indicates that significant percentages of minority defendants believe bias exists in many

of the aforementioned areas. If indeed perceptions of racial bias or insensitivity exist, then how do we, as responsible advocates and judges, dispel them if they are false, and eradicate the problems if the perceptions are true? Isn't this what the pursuit of justice is all about? I believe that solid investigative journalism, spirited and informed public discussion, heavily debated legislation, and passionate advocacy in the Courts ultimately will address these issues. Justice will result. It always, over time, does.

While we are talking about matters of race, we must not ignore the fact that out of 12,500 members of the Kentucky Bar Association, roughly 150 to 200 are black. This is a terrible statistic. It is not my fault. It is not yours'. It is the result of a nation where education has been undervalued for both black and white children, and where there has not been a long tradition of large numbers of black lawyers.

What about the public defender staffs themselves? In Jefferson County, there are 45 lawyers on staff -- only one is black. In Fayette County there are none.

In Jefferson County, a rough estimate of the clientele served by the public defenders would be 50%\50% black\white. Some estimates I have heard go up as high as 70%\30%. The images of the public defenders in the eyes of those they serve might improve in many instances if the lawyers representing them looked like them.

Similarly, perceptions—-or misperceptions—-of Kentucky's justice system would change dramatically, were there significantly more black judges and court administrative personnel.

This must change. It will only happen -- but it must happen -- over time. There must be intensive efforts by the Bar and the judiciary to identify promising African-American students at the elementary, junior and high school levels and, quite simply, to indoctrinate them with the desire to become great lawyers. One of the most effective things that we, as good lawyers can do, is to look for opportunities to work with our local schools to help educate students on fundamental concepts of liberty and justice that we too frequently take for granted. As lawyers I think we have a bounden duty aggressively to recruit minority students for law schools and in employment opportunities.

New Hope

Dick Clay's speech to the Department of Public Advocacy points anew to the ongoing struggle to end perceptions of racism in Kentucky's judicial system. Much progress has been made, but, as Clay points out, the 1998 Racial Justice Act offers new hope that we can reach "fair and impartial justice" for all Kentuckians, regardless of race, creed, sexual orientation, or age.

- Marion B. Lucas, Professor of History, Western Kentucky University

An example of a useful program would be that set up by the Kentucky Bar Association, Louisville Bar Association, Jefferson County Public School System, and Louisville Chamber Commerce, to provide jobs for minority youth in law firms, corporate law departments and governmental agencies in Jefferson County. This program was instituted back in 1993, and has averaged somewhere between 12 and 15 high school students a year -- most of whom come from Central High School's Law Magnet Program. These numbers aren't high, and it remains to be seen how many lawyers we will actually create.

We must keep trying. We must never give up. As lawyers, we have an ethical obligation to our profession and an even deeper obligation to our country to help raise up future Thurgood Marshalls, Leon Higginbothams, Harry Edwards', Johnny Cochrans, and (assuming you believe in an open and free-spirited intellectual debate in both the black and white communities) Clarence Thomas's, to pursue justice not only at exalted levels, but right here on the front line. We also have a duty as lawyers and judges to stamp out all vestiges of racism in our justice system, be they real or mere perceptions. Only in that way can we truly provide liberty and justice for all.

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Eliminating the Fact of Racism

Our Kentucky Supreme Court recently said that to preserve the trust and respect of the citizenry for the judicial system, counsel should be disqualified when there is an "appearance of impropriety," *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997). Dick Clay's eloquent address makes the point that there is a widespread perception of racism - surely a more serious concern than an "impropriety" -- which undermines the trust and respect of African-Americans for our courts. The question is what we -- as lawyers, judges, and legislators -- can do to eliminate not only the fact, but the perception of racism in the judicial system.

The 1998 Racial Justice Act is a good start. While impacting only a few cases, this act makes it clear that the legislature does not want race to be a factor in death penalty litigation. Some other suggestions:

- The Kentucky Supreme Court could use section 2 of the Kentucky constitution to make it easier to prove claims of discriminatory law enforcement. By disallowing discovery and refusing to infer discriminatory intent from pattern evidence, the United States Supreme Court has made it virtually impossible for a defendant to prove that an officer's actions were racially motivated in violation of the Equal Protection Clause of the Fourteenth Amendment. (*Wayte v. United States*, 470 U.S. 598 (1985), *United States v. Armstrong*, 116 S.Ct. 1480 (1996). Operating under their own constitutions, however, state courts can and should receive pattern evidence to prove

selective enforcement, and should allow discovery to obtain relevant data. In a recent New Jersey case (*New Jersey v. Pedro Soto*) the trial judge suppressed evidence seized by troopers patrolling the New Jersey Turnpike on the basis of statistics showing that, while 15% of speeding motorists were African-American, 46% of motorists stopped for speeding were African-American. This case, and others like it, are discussed in Maclin, *Race and the Fourth Amendment*, 51 Vand.L.Rev. 333 (1998). Since discrimination is difficult to prove by direct evidence, our Court should hold that a prima facie case of discrimination can be made by statistical analysis. After the Supreme Court's decision in *Whren v. United States*, 116 S.Ct. 1769 (1996), all drivers are subject to pretext stops (98% of motorists speed); it is the African-American young male who is most likely to be stopped for "DWB" (Driving While Black). The purpose of a suppression motion is to deter police misconduct. To deter selective enforcement, our courts should allow litigants discovery of police files to ascertain whether there is a pattern of selective enforcement, and be willing to infer discrimination in a specific case from pattern evidence.

- The Kentucky Supreme Court could hold, as a matter of state constitutional law, that there must be a rational neutral basis for a peremptory challenge which appears racially motivated. The United States Supreme Court recently held that the Fourteenth Amendment Equal Protection Clause does not require an attorney to give a rational reason for the exercise of an apparently racially-motivated challenge: a trial court may accept any explanation, no matter how implausible, so long as it is race-neutral. *Purkett v. Elem*, 514 U.S. 765 (1995). Since a trial court's acceptance or rejection of an attorney's explanation is reviewable only on an abuse of discretion standard, Purkett effectively places racial discrimination in jury selection, as a *federal* constitutional matter, beyond the supervision of the appellate courts. The Kentucky Supreme Court, however, could interpret the equal protection guarantee of the Kentucky constitution to require a plausible explanation for challenges which appear to be racially motivated.

- We should do what we can to ensure that jury venires adequately represent the relevant African-American population. I recently served on two venires in Fayette County, each consisting of about two hundred jurors. African-Americans were not proportionately represented on either venire. I don't know why, but apparently under-representation of minorities is common. In Detroit, for example, the federal court attempted to rectify the problem by striking every fifth non-African-American. However, the Sixth Circuit held that the plan violated the Equal Protection Clause. *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998). Perhaps a carrot and stick approach to jury service would cause a higher percentage of those summoned to appear and serve -- better pay and facilities, and less tolerance for no-shows and excuses.

- We should be reluctant to consider race or gender in "casting" a trial team. Selecting an attorney on the basis of race or gender degrades the attorney and assumes that jurors might be influenced by impermissible factors. *Batson v. Kentucky*, 476 U.S. 691 (1986) assumes that jurors will not be influenced by matters of race; that jurors can and will put aside their biases when they enter the box. Casting on the basis of race or gender is inconsistent with that premise.

- We should do what we can to encourage African-Americans to become police officers, lawyers, and judges. I've always thought that the best rationale for affirmative action in law school admission is to increase the number of African-American judges, prosecutors and defense counsel, and thereby make the justice system more closely mirror society. In the state of Kentucky, in too many cases the defendant is African-American and all the other players are white. No wonder there is a perception of racism. We should encourage bright, hard-working African-American young people to consider a career in law or in law enforcement, and provide financial assistance to those in need.

- William H. Fortune, College of Law
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SECTION 1. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS: (1) No person shall be subject to or given a sentence of death that was sought on the basis of race.

(2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.

(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death sentences were sought significantly more frequently:

(a) Upon persons of one race than upon persons of another race; or

(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

(5)The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

SECTION 2. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:
Section 1 of this Act shall not apply to sentences imposed prior to the effective date of this Act.

SECTION 3. A NEW SECTION OF KRS CHAPTER 532 IS CREATED TO READ AS FOLLOWS:
Sections 1 to 3 of this Act shall be cited as the Kentucky Racial Justice Act.

Employment, Incarceration, Kentucky Death Row, Kentucky General Population Statistics by Race

	DPA All Staff	Justice Cabinet All Staff	Kentucky Death Row	Kentucky Prisoners	Kentucky Population
White	93.5%	92.8%	78%	61%	92.3%
Non-white	6.5%	7.2%	22%	38%	7.7%

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HB 455 IS A Gamble

Sentencing Changes are Major

House Bill 455, also know as the Governor's Crime Bill, has as its most prominent feature a radical shift in major sentencing provisions in the Commonwealth. Some of these provisions are as follows:

1. Violent offenders must serve 85% of their time prior to being eligible for parole.

2. Considering probation and probation with an alternative sentencing plan has become mandatory. In fact, the granting of probation or probation with an alternate sentencing plan for nonviolent offenders has become virtually mandatory.

3. Nonviolent persistent felons are eligible for probation under many circumstances.

4. Circuit judges will be able to grant diversion motions over the objection of the Commonwealth.

5. Probation and parole officers will be responsible for developing alternative sentencing plans, identifying resources or the lack of resources.

We Are Imprisoning More Longer

This is a radical change in sentencing law in this Commonwealth. First, the Commonwealth is committed to incarcerating a lot more people for a lot longer. When I began to practice law in 1977, there were approximately 4000 people incarcerated in Kentucky. Parole eligibility on a sentence from 40-life was 6 years. There was no violent offender statute. That changed significantly in 1986 with the passage of KRS 439.3401. Today, over 14,000 people are incarcerated. The projection is 22,000+ persons incarcerated in

2002, and that projection was made before HB 455 passed. Off in the future, we will have persons serving 50-70 year sentences, with the parole eligibility of 42-59 years. This will be extremely costly. Built in is a financial time bomb for the Commonwealth. Unless…

Will Probation by Judges Really Increase?

That is where the gamble comes in. The 85% provision is mandatory. The gamble of HB 455 is that the 85% provision will be paid for by the granting of probation of most nonviolent felons. Yet, that provision is discretionary with circuit judges. The big question of HB 455 is whether the strengthened language virtually mandating probation will be sufficient to alter the sentencing practices of circuit judges. That is unknown. What we know, however, is that if the great majority of nonviolent felons, including PFOs, are not granted probation, then we will have lost the gamble.

Changes Needed by Many

Circuit judges are not the only ones who are called upon to change their practices by HB 455. These other players in the system will also need to alter their practice:

1. Defense lawyers will need to become more adept at developing and presenting alternatives to incarceration.

2. Probation and parole officers will need to shift their focus away from revocation, away from preparing PSI's exclusively, and toward identifying and developing alternative sentencing plans.

3. Prosecutors must begin to redefine victory. At present, many prosecutors define victory as someone going to prison. Prosecutors have immense power in our system; they can demand prison in every instance and by so doing put pressure on judges to deny probation. If this continues to be the paradigm, then we have little chance to win the gamble posed by HB 455.

4. Legislators must resist the temptation to criminalize everything, and to make felonies of everything. Legislators must also give this new law time to work. If it does not work, then legislators need to go back to reconsider the 85% provision.

5. The newly formed Criminal Justice Council needs to be vigilant to see whether the gamble of HB 455 is paying off, or whether the Commonwealth is losing.

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Parole Eligibility for Violent Offenders (in years)

SENTENCE	CURRENT	UNDER HB 455
10	5	8.5
20	10	17
30	12	25.5
40	12	34
50	12	42.5
70	12	59.5
Life	12	20
Capital	Life Without for 25	Life Without for 25
Capital	Death	Life Without Parole
Capital		Death

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Effective Courtroom Presentation

- Justice Donald Wintersheimer

Justice Donald Wintersheimer

The importance of effective oral argument at the appellate level cannot be overemphasized. Obviously, the principal purpose of the oral advocate is to give judges a better understanding of your position, your interpretation of the facts and the legal theory upon which you expect to prevail. For judges, oral argument brings the case into better focus and provides a time line in which the case is generally decided.

The traditional fundamentals must be observed in approaching any oral argument. The chief working tool in any oral presentation is a well-organized and concise brief. Certainly oral argument is important in the persuasion of the court, but the brief is a permanent record of your position and remains with the court throughout the ultimate decision making process. Oral advocates should be careful not to merely repeat or read their briefs. A well-developed oral argument is what the judges will immediately recall when they begin the decisionmaking process a. conference. Some judges form a preliminary opinion from initially reading the briefs and the oral arguments provide the opportunity to strengthen such views.

Be Prepared for Anything

Counsel should be prepared for anything and everything. The oral advocate must know the case thoroughly, both the facts and the law. You should practice your argument several times before entering the courtroom. An associate, friend or spouse should listen to your argument and make suggestions or

propound questions during such a practice.

The Opening Party

In the opening minute, establish the essential facts and the legal support for your position. Always stay within the record on appeal. The oral argument should be kept as simple and direct as possible with an emphasis on logical arguments rather than those that are frequently presented to a jury. You should avoid reading lengthy quotations, and unless it is a new case recently decided, citations are not generally necessary. Finally avoid disparaging your opponent or the court from which you are appealing.

Answer, Then Explain

Perhaps the most difficult challenge facing an oral advocate is the proper method of answering questions by the court. Answer the question directly with a simple "yes" or "no" and give a short explanation or justification for your answer. If you do not know the answer simply state that. Do not evade an adverse question, but say that your argument differs from that which may have been propounded in the bench question. Avoid being distracted from your argument by questions from the court. A good outline and careful practice by means of rehearsal will keep you on the points you wish to make.

Focus on Main Points

Limit the number of points you will try to make during the oral argument. Discuss only two or three points at the most and advise the court which you intend to discuss and which you will leave to the briefs. If the court asks you to discuss a particular point, do so at once.

Make Rebuttal Count

Rebuttal should be concise and avoid repetition. If your opponent misstates the record or raises an argument which you have not addressed, rebuttal can provide an opportunity to correct and respond. You should be careful not to repeat arguments already made or to initiate any new matters. In some cases, experienced counsel have waived rebuttal entirely.

Answer When Asked

Answer the question when it is asked and do not tell the court that you will get to the question at a later time. If you are not clear on the impact of the question. Ask for a clarification. Always listen to the question very closely and do not respond too quickly. You should also be careful not to interrupt the judge while he is framing the question.

Dress for Court

Considerable emphasis should be placed on courtroom decorum and appearance. Attendance at any judicial proceeding should be marked by appropriate clothing that does not distract the panel of judges from your primary purpose, that is, the legal arguments. Clearly, flashy sports clothing is inappropriate. Counsel should always follow the directions of the court which are generally distributed before oral arguments.

Be Prompt, Be Polite

Promptness cannot be overemphasized because the court can and will start without you. Ordinary politeness is the best rule to follow. Begin your presentation with the traditional phrase, "May it Please the Court." Refer to the court or individual judges as "Your Honor" or "This Court."

Avoid flippancy, off color language or personal references to opposing counsel, and certainly to members of the Court. When addressing the Court at any level, appellate or trial, a good lawyer should stand, if able, before making any response. Whether you are preparing your first argument or your thirty-first, these points should be reviewed periodically to deliver your most effective courtroom presentation.

Justice Donald Wintersheimer
Supreme Court of Kentucky
Covington, Kentucky

Justice Donald Wintersheimer received his A.B. from Thomas More College; his M.A. from Xavier University and his J.D. from the University of Cincinnati. He was in private practice and served as City Solicitor for the City of Covington until his election to the Court of Appeals in 1976. In 1982 he was elected to the Supreme Court and was re-elected in 1990. Justice Wintersheimer is a prolific opinion writer on the Supreme Court having an average of over 40 opinions each year, the most for any member of the Court.

Justice Donald Wintersheimer

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I. The Negotiation Process: *Planning the Dance*

A. Learning the Music and the Steps

Good criminal defense lawyers do not start out assuming their client is guilty or that a plea bargain is the best resolution of the case. Rather, as the *ABA Standards for Criminal Justice* recognize, the competent, committed advocate will conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of a conviction. Even if the defendant expresses a dear desire merely to plead guilty, the lawyer still has the responsibility to undertake an appropriate investigation to ensure that the client's intended guilty plea has a basis in fact and in law.

Admittedly, the extent of that investigation and the lawyer's ability to push for a trial will be significantly hamstrung if the defendant lacks the will or desire to contest the charge. Nonetheless, the diligent defense lawyer understands that the defendant may not recognize potential defenses or appreciate legal challenges so she will carefully evaluate the merits of the case before even considering jettisoning the trial option.

Similarly, in gathering information from the defendant about his or her background and in investigating the case, defense counsel should take care not to allow a client's professed preference for a guilty plea to cause counsel to prejudge the case or to curtail the search for valid defenses and important legal issues. Moreover, because such preparation is a necessary prelude to negotiation, defense counsel should not prematurely press the defendant for permission to negotiate.

Defense counsel who too eagerly pushes the merits of plea bargaining or working out a dealt also may lose her client's confidence. If the client is unfamiliar with the workings of the criminal justice system, it maybe appropriate for defense counsel to discuss the settlement option. Prior to doing so, however, defense counsel should discuss with the defendant his or her expectations and desires regarding the case and undertake an appropriate factual and legal investigation.

Once counsel has completed that investigation and is satisfied that the prosecutor possesses a sound factual basis for the crime charged, counsel may seek the client's permission to negotiate. Defense counsel should make clear that engaging in settlement negotiations does not necessarily mean that counsel is recommending that alternative. Counsel should discuss with the client the extent of counsel's settlement authority as well as the client's goals or desired outcomes. If the client is not interested in pursuing a plea bargain and insists on going to trial, defense counsel ought not initiate any settlement discussions. This does not mean, however, that defense counsel ought not try to persuade the defendant to reconsider such a choice, especially if counsel's investigation suggests there is little chance to prevail at trial. Indeed, it would be very poor lawyering to simply permit a client to proceed to trial on a hopeless case without trying to convince that client to consider plea bargaining. Moreover, defense counsel is still obligated to relay to the defendant any offer made by the prosecutor. If defense counsel, however, is unable to persuade a defendant to allow her to negotiate, counsel generally should not continue to seek a plea agreement with the prosecutor even though counsel feels that a plea bargain is in the defendant's best interest.

If defense counsel and the defendant agree that plea bargaining should commence, counsel must prepare so that she can negotiate effectively. As every article or text on plea bargaining recognizes, good preparation is the key to successful negotiating. Although this point may seem obvious, it is clear that a significant number of defense lawyers go to negotiate having done little more than interview the client and briefly review the police reports.

Effective preparation for a plea bargaining session - like effective preparation for trial - begins with a thorough client interview. Rarely will defense counsel be able to effectively represent a client without learning as much as possible about the client and his or her knowledge of the facts surrounding the

charges. It is also critical that defense counsel learn as much as possible about the client's personal circumstances and background. This information not only is needed to determine if an affirmative defense such as a battered woman's defense or insanity defense should be raised, but also it will enable counsel to personalize the accused if the defendant subsequently takes the stand at trial. At a minimum, counsel needs to know about a defendant's living situation, dependents, employment history, education, past and present legal difficulties, disabilities and mental health history. In some cases, however, especially murder cases with the possibility of the death penalty, counsel's inquiry into the defendant's past will need to be even more extensive.

Some clients may be reluctant to open up to personal questions or may view questions about their background as unnecessary prying. Counsel cannot, however, simply give up. Indeed, counsel's failure to adequately pursue information about the defendant's background, in some instances, can constitute ineffective assistance of counsel. Counsel usually can avoid or overcome a client's negative reactions to such inquiries by explaining the importance of such questions and, if appropriate, by delaying sensitive questions until some trust and rapport have been established in the attorney-client relationship.

To negotiate effectively, defense counsel must be so familiar with the defendant and her life experiences that she can personalize or humanize the defendant when she talks with the prosecutor. Defense counsel who is unaware or unprepared when the prosecutor inquires about the defendant's present job status or work history may seriously undermine her efforts to obtain a favorable sentencing concession. Finally, defense counsel who is informed about and ready to present effectively the defendant's mitigating personal circumstances also will be able to afford the defendant zealous representation at sentencing.

In addition, it is critical that defense counsel inquire about the defendant's personal situation so counsel can advise the client about the collateral consequences of a guilty plea or conviction. A criminal conviction can cost a defendant the right to drive, a professional license, or even the ability to remain in this country. Although a defense attorney's failure to alert or warn a defendant about such collateral consequences generally has not been deemed sufficient to invalidate a plea or to secure reversal of a conviction on grounds of ineffective assistance of counsel, the lawyer s role as counselor requires that she apprise the client of considerations that are likely to affect the client's life. Indeed, these so-called collateral consequences may be considerably more important to the defendant than the punishment proscribed by the judge at sentencing in the criminal case. Accordingly, defense counsel should make the defendant aware of the full impact of a criminal conviction and help the defendant evaluate possible collateral consequences before making significant decisions about the case.

Next, counsel must attempt to assess the strength of the prosecution's case as well as counsel's ability to attack that case or successfully raise an affirmative defense. In some cases, this is a fairly easy proposition. The defendant, for example, is caught in front of numerous witnesses walking out of a store with an item she was attempting to steal and gives a statement admitting the offense. In many other cases, however, defense counsel faces a formidable challenge in assessing the true strength of the prosecution 's evidence. This task is complicated by the fact that counsel may have limited access to the prosecution's case, especially in the early stages of a criminal prosecution. If defense counsel, either by statute or because of the practices of the local prosecutor, has easy and early access to police reports and

other discovery material, counsel's task is much easier.

To meaningfully assess the prosecution's case, defense counsel usually will need to secure the assistance of an investigator and often expert witnesses as well. Accordingly, it is incumbent upon defense counsel to file a motion requesting the appointment of an expert or investigator at the state's expense arguing that such assistance is necessary to assure the defendant's right to due process and the effective assistance of counsel. National studies consistently show, however, that criminal defense attorneys frequently fail to obtain or are denied ready access to adequate investigative assistance and expert services despite the importance of such support services.

As part of the investigation leading up to settlement negotiations, defense counsel also should attempt to ascertain if the prosecutor has any significant proof problems. Counsel should try to determine if the state's witnesses are still around ant actually available to testify. This is easier to discover in a state like Oklahoma where the prosecution's witnesses must be identified on the initial charging document. Similarly, talking to prospective defense witnesses, particularly alibi witnesses, is an important part of the preparation process. Counsel must not only be able to assess the strength of any defense witnesses but be able to realistically predict whether those witnesses will actually show up and testify at trial. In addition, counsel must judge the strength of the defendant's own testimony and the merits of the defendant's liking the witness stand.

Another aspect of counsel's preparation is to determine the status and positions of any co-defendants, co-conspirators or other persons involved in the events underlying the charge facing the defendant. The existence of other individuals who also are implicated in the crime often complicates counsel's task. These people may play a key role in exonerating or burying defense counsel's client. Again, it may be difficult to figure out in advance of a negotiating session whether these other persons are planning to plead guilty or to testify against counsel's client. Nonetheless, the more information that defense counsel has about the role that others played in an offense and the defendant's relationship with these other persons, the better able counsel will be to assess the risks the defendant faces.

In addition to determining if the state has sufficient, available evidence to convince the jury beyond a reasonable doubt of the defendant's guilt, defense counsel should ascertain whether the legality of any aspect of the state's case can be challenged. This evaluation also should be made, as best as possible, before attempting to resolve the case. Certainly defense counsel should be able to conduct the necessary legal research to determine if the charging instrument, the manner in which the charge was brought or the underlying statute is subject to any constitutional or other legal challenge. Although occasionally a prosecutor may welcome such a challenge, most prosecutors do not want to expend limited resources and to be embroiled in a time-consuming constitutional battle. Defense counsel who can identify and mount an effective challenge to the constitutionality of a statute will find herself with a strong bargaining chip. The prosecutor may well decide to abort the case at the trial level rather than risk the statute being struck down.

Defense counsel confronts a more difficult task in assessing the viability of most evidentiary motions.

With limited access to the state's case, the defense lawyer often must speculate what explanations law enforcement officers will proffer to justify their seizure of the accused or of some incriminating evidence. Counsel then must predict how those justifications will play before the trial judge and possibly an appellate court. Unquestionably, defense counsel's ability to raise and to litigate suppression motions effectively is an important factor in defense counsel's overall effectiveness. Aggressive motion practice may enable counsel to secure the dismissal of charges in a case in which the defendant has no defense on the merits. It is essential, therefore, that before starting any serious negotiations, counsel determine whether any motions are appropriate, assess the strength of those motions, and prepare fully to argue those motions if counsel and the client deem it strategically wise to do so.

Before initiating any plea bargaining, a few final preparatory steps are necessary. Defense counsel should scour the statutes to try to find other lesser offenses which directly or indirectly deal with the defendant's conduct. There may be another felony offense, a misdemeanor or even a municipal ordinance violation that defense counsel can argue is a better fit or a suitable compromise in the defendant's case. In some instances, defense counsel may even be able to find an administrative regulation that covers the defendant's behavior. Counsel also should determine if there are any local conventions - a dismissal upon payment of terms - which represent a suitable resolution of the defendant's charges.

Just as it is important for defense counsel to be aware of any local conventions which may provide a simple and satisfactory resolution of the defendant's case, it is critical to learn the "standard deal" in a case such as the defendant's. Although a prosecutor's initial offer will depend on a number of variables, prosecutors generally work from a starting point or "standard deal" that is based primarily on the nature of the charge and the defendant's record. The extent to which a prosecutor ultimately will be willing to deviate from that "standard deal" generally depends on a host of factors including time, resources, defense counsel's ability, reputation and relationship with the prosecutor, evidentiary concerns, the victim's wishes, and the aggravating and the mitigating circumstances of the case. Nevertheless, the criminal defense lawyer who is aware of the "standard deal" prior to going into a negotiating session will be better able to plan for that session as well as to respond to developments in the negotiating process.

Defense counsel also must weigh the possibility that the defendant could be prosecuted in another forum for the events which form the basis for the defendant's pending charge. It may well be in the defendant's interest for counsel to persuade the prosecutor that the case would be more appropriately handled in that other forum. In some instances, counsel may have to engage in plea negotiations in different forums on the same matter or in several jurisdictions involving multiple cases in an effort to minimize the defendant's punishment or exposure. In other cases, counsel may have to make quiet inquiries about general policies or practices of prosecutors in another county or of federal authorities in an effort to secure information-without arousing attention-about the likelihood of charges being filed against the defendant.

Finally, many defendants are caught up in the criminal justice system because they have alcohol, drug, or mental health problems. Such problems may have led directly to the defendant's pending charge, or they may be significantly affecting the defendant's life and her ability to cope with any demands or restrictions placed upon her. Prosecutors and judges recognize the significance of substance abuse and mental health

problems and, to varying degrees, attempt to respond to such problems in meting out plea bargains and sentences. Such problems may, at times, be mitigating and lead to very favorable outcomes for some defendants. In other cases, however, a defendant's mental condition or drug problem may lead to a much harsher disposition. If defense counsel is aware of a client's condition or problem as a result of counsel's confidential communications with the defendant, defense counsel should not disclose the existence of that condition or problem without the defendant's consent.

If a competent client acknowledges a problem and accepts counsel's advice that it is strategically wise to disclose the problem, counsel still may need to substantiate or document the problem in order to secure any advantage during the negotiation process. In addition, it may be extremely helpful to develop a program or plan for addressing the client's problem. Indeed, defense counsel's ability to find a suitable program not only may be necessary to convince the prosecutor and judge to agree to a disposition of the defendant's case that allows her to remain in the community, but it also maybe critical to helping the defendant stay out of the criminal justice system in the future.

B. Selecting the Right Music and Choreographing the Steps

Once defense counsel has undertaken the necessary *steps to* be adequately prepared to plea bargain, counsel must formulate an appropriate negotiating strategy to use for that particular case. Some commentators have argued that a particular negotiating style or certain principles are applicable in any negotiation context. Other theorists contend that a lawyer's negotiating approach should vary depending on the lawyer's assessment of the particular negotiation in question, the context, and the players involved.

Professor Don Gifford has fashioned a negotiating strategy which he argues can be used by criminal defense lawyers as a model in most plea bargaining situations. According to Gifford:

Negotiation theory suggests that the plea bargaining strategy most likely to succeed in a typical case is one which begins with a competitive approach and progresses to a cooperative approach as negotiations continue. To accomplish this strategy switch, the defense attorney should attempt to maintain a cordial and accommodative relationship with the prosecutor, even during the early phases of bargaining. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiations*, 46 Ohio St. L.J. 41, 82 (1985).

Gifford concludes that the use of this recommended strategy for most criminal cases is possible-despite the fact that the mechanics of plea bargaining and the behavior patterns of the attorneys vary depending on the locale and the case-because the plea bargaining process generally exhibits certain characteristics that determine which strategy is likely to succeed.

Although Gifford's model does provide a helpful starting point in choosing a negotiating strategy, it does not eliminate the need for defense counsel to examine and to analyze carefully a number of systemic factors, including the characteristics identified by Gifford, to see how these factors play out in counsel's specific case. It is the interplay of these factors which invariably will affect counsel's ability to achieve a

desirable plea bargain. Gifford admits that "when deciding a negotiating strategy, the defense attorney should always determine the factors that distinguish the instant case from the usual plea bargaining situation. If these factors are important, the attorney may want to modify the suggested strategy. Even adopting Gifford's model, then, defense counsel in every case must examine a host of important systemic factors. Although these factors will change somewhat from jurisdiction to jurisdiction and even from case to case within a jurisdiction, counsel's analysis of these variables is essential if counsel is to obtain the best plea bargain possible for the client. Just as a failure to prepare adequately may be fatal to counsel's plea bargaining success, the use of any generalized approach without analyzing the specific variables relating to the defendant's particular case undoubtedly will limit counsel's effectiveness.

The first factor counsel must consider, albeit not necessarily the most important, is the strength or weakness of the defendant's case. Unquestionably, the stronger the prosecution's case, the less leverage defense counsel will have in the bargaining process. On the other hand, if the defendant has a strong defense, defense counsel may wield considerable leverage in the process. Yet, as has already been suggested, it is often difficult for defense counsel to access the strength of the prosecution's case with any precision. Even if defense counsel has early access to the state's evidence, experienced trial lawyers recognize that a case that is strong on paper may not be nearly as strong when the witnesses actually testify at trial. In fact, as noted earlier, the state's witnesses may not show up at trial or they may testify wholly inconsistently with what is contained in the police reports. Although defense counsel generally will be in a better position to assess the strengths and weaknesses of the defense case, counsel's ability to accurately assess the likelihood of an acquittal ultimately turns on her experience, the case, and the quality of her judgment.

In addition, defense counsel must determine if there are any aggravating or mitigating circumstances related to the defendant's crime which distinguish it from similar offenses. For example, a battery case between two men in which the victim sustained a black eye is likely to be viewed differently than if the same case resulted in a fractured jaw. Similarly, the prosecutor may view the seriousness of a defendant's battery offense as markedly worse if the victim was elderly or the beating was accompanied by racial slurs. Because the aggravating or mitigating circumstances of an offense often will influence how others in the system view the defendant's case, defense counsel must weigh the impact of any such circumstances in the defendant's case before selecting a negotiation strategy.

A second significant variable that defense counsel must take into consideration when formulating a plea bargaining approach is the prosecutor handling the defendant's case. The personality, philosophy, trial ability, and negotiating style of that prosecutor should influence defense counsel's approach in a variety of ways. For example, a particular prosecutor may be generally reluctant to go to trial and eager to dispose of cases by way of negotiation. If defense counsel is aware that the prosecutor assigned to the case has such an attitude, counsel may have more leverage than when facing a prosecutor who loves to try cases. Similarly, some prosecutors are superb trial lawyers while others are weak. Counsel may evaluate the likelihood of success at trial and correspondingly the viability of the trial option should negotiations break down based, in part, on her assessment of the prosecutor's trial skills.

Defense counsel may have dealt with a prosecutor enough to be able to determine if that prosecutor has a

particular or unusual negotiating style. Certainly, some prosecutors will appear to engage in the bargaining process when, in fact, they never intend to move off of their initial offer. This negotiating approach - making a reasonable opening offer and refusing to budge - has been labeled Boulwarism in the labor context. Defense counsel negotiating with a prosecutor who adopts such a highly competitive strategy may be making a mistake if she responds to the prosecutor in a cooperative manner and discloses weaknesses in the state's case or positive aspects of the defense case in an effort to convince such a prosecutor to grant concessions. Indeed, disclosing information to such a prosecutor may strengthen his or her hand by weakening the defendant's chances for success at trial. On the other hand, if the prosecutor is a fair and reasonab1e negotiator, counsel may be inclined to share more information and do so early in the bargaining process. Whenever possible, therefore, defense counsel should atempt to learn as much as she can about the prosecutor's bargaining style.

As discussed earlier, heavy caseloads pressure many prosecutors to plea bargain most of their cases. Thus, caseload pressure may provide defense counsel important leverage. This pressure tents to be somewhat uneven, however, so defense counsel may be in a better bargaining position at certain times than at others.

Defense counsel's bargaining strategy also should take into consideration the charging process used by the prosecutor's office. If possible, defense counsel should attempt to get involved in the process before formal charges are filet because counsel may be able to exert a positive influence on the charges finally selected or even block the issuance of charges. Frequently, however, counsel will not be retained or appointed until after formal charges are filet. Counsel still should bear in mind that the nature of the charging process is likely to influence the prosecutor's willingness to dismiss or to reduce charges as part of a plea bargain.

Many prosecutors' offices have written office policies regarding certain crimes and particular types of sentencing-related concessions. These policies may severely restrict a particular prosecutor's ability to dismiss cases or reduce charges to lesser offenses. The more informed defense counsel is about such policies, the better able counsel will be to obtain a favorable disposition for the client. Moreover, the prosecutor's freedom to bargain frequently depends on the prosecutor's status or rank in the office. Young prosecutors tend to feel the need to appear "tough" and so are often reluctant or even unwilling to dismiss charges. This is particularly so if the charges have been filed by an experienced, senior prosecutor. The culture of politics of a prosecutor's office also may limit the individual prosecutor's freedom to bargain.

Finally most prosecutors' offices, especially the larger ones, have an internal chain of command which defense counsel meets to consider in formulating her negotiating strategy. If there is a viable review process within the prosecutor's office, counsel may be able to negotiate somewhat differently than if no such review is possible. Say, for example, that a young, fairly hard-headed prosecutor is handling a minor felony case. If defense counsel knows that she ultimately can go over that prosecutor's head to a senior prosecutor if she is not satisfied with the prosecutor's final offer, then counsel's negotiating tactics may be different than in a situation where no such review is possible. If the senior prosecutor or final decision maker in a prosecutor's office is unreasonable or unapproachable, defense counsel will have to cope with the fact that the initial prosecutor is the one who must be convinced if a favorable bargain is to

be obtained.

Defense counsel's ability to obtain a favorable outcome also is influenced by another variable: the judge assigned to the defendant's case. In some jurisdictions this variable is particularly hard to assess because no particular judge is assigned in advance of a trial or a guilty plea hearing. This increases defense counsel's uncertainty and limits her ability to predict the merits of going to trial, arguing sentencing, or accepting a settlement offer. The importance of this variable, therefore, depends in large part on the scheduling practices and procedures of counsel's jurisdiction. Nonetheless, defense counsel must recognize that the client's critical decisions as well as counsel's leverage in the bargaining process may turn substantially on the personality, philosophy, and sentencing proclivities of the judge to whom the case finally is assigned.

Defense counsel generally is in a better position when going into a negotiating session if she is knowledgeable about the judge who will eventually hear the case. The judge may be a grant or exceptionally fair at trial. The judge may be reasonable or extremely harsh in imposing sentences. Some judges blindly follow the sentencing recommendations of prosecutors while others are open to defense counsel's persuasive arguments. Some judges clearly punish defendants who go to trial and lose. Other judges are very responsive to political pressure, especially near election time. Thus, a judge may be more willing to accept a plea bargain or respond - favorably to a defense lawyer's sentencing argument in certain cases - those out of the public eye - than in others.

Admittedly, defense counsel may be hard-pressed to get an accurate assessment of how a particular judge will respond to a certain client or specific offense. Nevertheless, a lawyer is courting disaster if she fails to take into account the extent to which the sentencing proclivities of the judge may control the outcome of a case. Take, for example, the case of an appointed defense lawyer in Wisconsin who was representing a defendant charged with a residential burglary. Although the defendant had just turned eighteen and had no adult record, he did have a lengthy juvenile record that included several burglary adjudications. Defense counsel approached the prosecutor with a proposed plea bargain: his client, a first offender, would plead guilty to the charge in exchange for a recommendation of probation. The experienced prosecutor quickly agreed recognizing that in front of the judge, who was assigned to the case, the prosecutor's recommendation of probation was really meaningless in light of the judge's usual practice of sending a person to prison for a second burglary offense. Given this defendant's extensive juvenile record, this judge clearly would not view him as a first offender. Defense counsel and his client, both unaware of this judge's sentencing philosophy or practices, entered the guilty plea with the expectation that he would follow the prosecutor's recommendation. To their shock, the judge gave the defendant eight years in prison.

This case illustrates the importance of securing information about a sentencing judge. Because he knew nothing of this judge's sentencing practices, defense counsel really did not get any benefit from the deal he struck with the prosecutor. Had he been aware of the judge's attitude toward residential burglars and his sentencing policies, counsel may have been able to strike a bargain for a shorter prison recommendation which, in turn, the judge may have followed. Or, at least, defense counsel may have

been better prepared to go into the sentencing hearing with more ammunition and arguments designed to persuade this judge to deviate from his standard practice in such cases. Finally, had the defendant been advised that this judge was likely to send him to prison if he entered a plea, the defendant may have evaluated his trial prospects differently and decided to go to trial. In the end, however, lack of preparation and analysis robbed the client of effective representation.

As with most prosecutors, most judges have heavy dockets which pressure them to move cases. To relieve pressure on their dockets, judges push all of the actors in the system to settle their cases. Judicial settlement pressure may work to the client's advantage or disadvantage depending upon the case and the other systemic variables discussed in this article. Defense counsel's ability to recognize, to understand, and to manipulate that pressure to the client's advantage may spell the difference between a good or marginal outcome for the client.

Another significant variable in the bargaining process is defense counsel's own reputation, preparation, and relationship with the other actors in the system. Some defense lawyers in certain cases will be able to obtain a very favorable outcome for a client simply because of who they are. It may be that defense counsel formerly worked in the prosecutor's office or has a particularly good relationship with the prosecutor handling the case. Defense counsel's reputation as a brilliant lawyer often will give that lawyer considerable leverage in the plea bargaining process. Similarly, defense counsel's poor reputation especially as a lawyer who never goes to trial - will severely diminish that lawyer's bargaining power. The extent to which defense counsel can successfully implement a competitive negotiating strategy will, in part, be a function of counsel's trial abilities and her capability of projecting a credible threat to take a case to trial.

Lawyers who are just starting out in a jurisdiction usually will have comparatively little bargaining power until they gain a reputation as a willing and able trial lawyer. It may be difficult for the young lawyer, therefore, to adopt a highly competitive negotiating stance in an effort to wring concessions out of an experienced prosecutor because that prosecutor will not view that defense lawyer's threat to go to trial as credible. The young criminal defense lawyer can enhance her credibility and begin to build a good reputation by demonstrating through good motion practice and through effective presentations in court and in negotiating sessions that counsel knows the law as well as the facts of her case. The criminal defense lawyer who fails to investigate her case or to research the law and who evinces a willingness to plead guilty quickly to dispose of her cases is doomed to a reputation as a mediocre advocate. There are other variables which have a significant effect in some but not all criminal cases. Arresting officers clearly exercise considerable discretion in determining what charges, if any, actually are brought against a criminal defendant. Moreover, police officers regularly communicate with prosecutors about defendants and their cases. Not surprisingly, then, the attitude and input of the arresting or investigating officers will at times greatly influence a prosecutor's attitude about a case. In some jurisdictions, defense counsel may be able to affect the feelings of the arresting or investigating officer with respect to the defendant and to get that officer to make a positive comment on the defendant's behalf or, at least, refrain from denigrating the defendant. In other cases or in other jurisdictions, prosecutors may be generally unresponsive to feedback from the police regarding case dispositions.

Some prosecutors are very sensitive to crime victims so that the attitude and input of the complaining witness may be critical in determining the parameters of a plea bargain. This maybe especially true in certain types of offenses such as sexual assault or domestic violence. Certainly, in recent years, more attention has been paid by the actors in the criminal justice system to victims of crime. Nonetheless, the influence the complaining witness will have in the disposition of a case will vary significantly depending on the crime, prosecutorial policies, and the underlying merits of the case. In some instances, the desire of the complaining witness to dismiss or drop the charges may provide defense counsel considerable leverage. On the other hand, the complaining witness may pressure a reluctant prosecutor to push a marginal case to trial rather than work out a reasonable settlement. Defense counsel, then, cannot afford to ignore this variable before selecting a negotiation strategy.

Linked to the attitude of the complaining witness is the attitude of the community toward crime in general and to defense counsel's client in particular. Defense counsel's efforts to secure a favorable disposition for a client may be thwarted because of the publicity and attendant public sentiment generated by a particular crime. Similarly, a crackdown on drunk driving, on car jackings, or on drug dealing in a particular housing development may produce intense publicity which complicates the ability of the prosecutor and defense counsel to arrive at an acceptable plea agreement. In fact, defense counsel's ability to achieve a favorable outcome for a client may depend on counsel's success in minimizing media attention. At the very least, counsel must be sensitive to this variable before settling on an approach to use with the prosecutor.

Once defense counsel has thoroughly prepared and has undertaken an analysis of the salient factors which counsel believes are likely to affect the defendant's case, counsel is ready to plea bargain. To bargain effectively, defense counsel must develop a negotiation strategy that is tailored to the specific case she is handling and that appropriately takes into account the systemic factors likely to affect the disposition of the case, including the culture of the local criminal justice system as well as counsel's own negotiating style. In short, defense counsel must formulate a strategy that maximizes her ability to take advantage of whatever leverage she can muster to achieve the best possible outcome for her client.

II. Implementing the Strategy: *Minimizing Dancing in the Dark*

The question of how counsel should proceed to implement the negotiation strategy she has selected inevitably is linked to the factors or reasons she chose the strategy and influenced by counsel's own negotiating style. Defense counsel must, of course, remain flexible and able to respond to the ebbs and flows of the negotiation session. This article does not offer a choreographed script, road map, or game plan to use in the typical plea bargain session. The better counsel is at anticipating moves and developments in the negotiating session, the better she will be at devising initial plans and. Developing contingencies that will allow her to respond effectively as negotiations unfold. Given the number of variables involved and the fact that circumstances often change drastically during negotiations, counsel must be able to analyze a changing situation, to respond to rapid developments and to make tough

judgment calls.

The complexity and fluidity of the plea bargaining process lends me to disagree with Donald Gifford regarding the relative roles of counsel and client in selecting a negotiating strategy. Gifford takes the view that defense counsel not only must discuss negotiation strategy with the client but that the choice of strategy is a joint decision. Gifford's position is different from that espoused by ABA *Standard 4-5.2* which provides that, after consultation, strategic and tactical decisions are the exclusive province of defense counsel and from Anthony Amsterdam's position that defense counsel controls all tactical decisions including "what discussions will be had with the prosecutor." Even though it may be generally desirable for counsel to discuss the choice of negotiating strategy with the client and secure the client's consent to a particular approach, it is often not feasible. Although a lawyer generally should be required to seek the client's permission before negotiating, she should not be obligated to fully discuss negotiation strategy in every case. The choice of negotiation strategy may change dramatically depending on a variety of factors, including which prosecutor is available on a given day. The need to react to a wide range of contingencies and to maneuver in a free flowing bargaining session may preclude meaningful discussion and selection. As a practical matter, the client's lack of a telephone or transportation problems may seriously hamper or block communication between lawyer and client, thereby delaying counsel's plea bargaining. In the end, although a client's input into the lawyer's selection and implementation of strategy may be desirable, it is not, and probably ought not, be mandated.

On the other hand, counsel cannot select a strategy which ignores the best interests of the client as defined by the client. For example, the defendant may stand to gain by supplying information or agreeing to testify against other people. "Rolling over," "flipping," or "ratting out" someone else can be extremely advantageous to the defendant. It also can be dangerous and indeed, even deadly. Some defense lawyers take the position that they will not provide representation to any client who wishes to turn on another person to save himself or herself. Others argue, however, that defense attorneys, especially those representing an indigent defendant, have an ethical obligation to assist the defendant who wishes to be "a rat" or "a snitch."

Providing information to the state clearly is an alternative which may be in the best interest of some clients. Because a client has the right to set the objectives of the representation and providing information may be critical to that client's securing his objective - say, for example, a dismissal of the charges - the client ought to have the power to decide whether or not to cooperate with the state. A private lawyer who does not wish to represent "a rat" is permitted to do so but only if that lawyer has secured the client's informed consent at the outset of the representation.

Absent such informed consent, however, defense counsel cannot unilaterally decide to refuse to consider or even seek a cooperation agreement because of the lawyer's own philosophy or principles. This is especially true for the defense lawyer who represents the indigent who has no opportunity to select counsel. Eliminating a potential option for the defendant without even giving the defendant the opportunity to consider that option is particularly offensive because the defendant may find himself or herself sold out by a co-defendant - represented by defense counsel with a different philosophy - who has cut a deal with the prosecutor to testify against the defendant. It is the defendant, not defense counsel,

who ultimately must decide whether cooperation is an alternative the client wishes to pursue.

Counsel's strategic decisions and her efforts to implement those decisions, therefore, should be consistent with the client's expressed objectives. The committed defense lawyer will use whatever means possible - within ethical bounds - to obtain the optimum result for her client. Notwithstanding counsel's best efforts, she may run up against a favor over which she has little control. For example, counsel and the prosecutor assigned to the case may have a personality conflict that started in law school. Although a negotiating strategy is separate and distinct from a negotiator's personal characteristics, style, and strategy often do get intertwined. Yet, as Gifford argues, the more the lawyer can separate her own personal characteristics from her negotiating strategy and be able to use competitive, cooperative, and integrative tactics even within an individual negotiating session, the more effective that lawyer is likely to be.

Thus, not only should defense counsel try to rise above personality conflicts, she should adopt a style that works for and is consistent with her personality. As in trial work, trying to mimic someone else's style rarely is effective. Nor is it generally desirable for counsel to approach every bargaining session in the same way or with one uniform style. Rather, defense counsel must settle on an approach that will be effective with the prosecutor with whom she is bargaining.

Not only must defense counsel have adequately prepared before structuring a negotiating approach, counsel must be prepared for the actual bargaining session. Particularly when dealing with a prosecutor for the first time, defense counsel should demonstrate counsel's keen familiarity with the facts and the law of the case. This does not mean, however, that defense counsel should show off. Rarely will this impress the prosecutor, especially if the prosecutor is a seasoned veteran. Rather, it means that counsel should have a good command of the facts and of the client's background so that counsel can respond to the prosecutor's inquiries and project a confident image. If counsel fumbles around in her file to determine if the client is presently employed or how many children the client has, the prosecutor will draw negative conclusions about counsel's preparation. For the novice lawyer trying to make a favorable impression, lack of familiarity with one's file sends precisely the wrong message.

Both sides may go into a plea bargaining session attempting to find out more about their opponent's case while bluffing or posturing about their own case. Of course, neither defense counsel nor the prosecutor may lie during negotiations. The line between a lie or deliberate misrepresentation and bluffing, posturing, puffing, or gamesmanship, however, is not always clear. The Comment to *Model Rule 4.1* reflects this uncertainty by acknowledging that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact...and a party's intentions as to an acceptable settlement of a claim are in this category." Not surprisingly, then, there is widespread disagreement among practitioners and scholars as to the kinds of statements and tactics which are improper.

Professor Albert Alschuler claims that prosecutorial "bluffing" is widespread and that prosecutors willingly misrepresent facts to sustain their bluffs and obtain convictions. On the other hand, the authors of *Plea Bargaining: Critical Issues and Common Practices* (1985) found little evidence that prosecutors

deliberately misrepresent facts. Rather, their research suggests that prosecutors generally agree that such conduct in negotiations is improper and unethical. Nonetheless, their research also shows that many prosecutors feel they could legitimately attempt to bluff defendants into pleading guilty in cases in which the prosecutor had various weaknesses or proof problems and frequently did so.

In attempting to realistically assess the strength of the state's case, therefore, counsel must recognize that the prosecutor may be bluffing about her case. Especially when one is dealing with an adversary for the first time, it may be difficult to ascertain if the prosecutor's case is as solid as she represents. Defense counsel may want to direct specific questions to the prosecutor to force her to reveal whether, in fact, her critical witnesses are available or whether particular evidence has been duly analyzed. Assuming that the prosecutor will respond truthfully to such inquiries, defense counsel will be in a better position to successfully resolve the case. Indeed, the more defense counsel can develop her skill as a patient, active listener, the more likely she can induce the prosecutor to disclose even more information in the negotiating session than the prosecutor intended.

It is ill-advised and dangerous for defense counsel to get caught exaggerating or stretching the truth. Again, this is particularly so when dealing with an adversary for the first time. If defense counsel asserts that the client has been in the jurisdiction for only a short time to which the prosecutor responds by noting the defendant's conviction for drunk driving five years ago in the same county, defense counsel may find herself in a very defensive posture. This will, of course, happen to every defense counsel from time to time because counsel will be relying, at least in part, on information from a client who may have lied or been confused about certain facts. Nevertheless, defense counsel should attempt to ensure that lack of familiarity with her client's case does not add to this problem.

It may not be advisable for defense counsel to seek to resolve a case in counsel's first meeting with the prosecutor. Although a host of factors, including the defendant's pretrial detention, financial restraints, or employment needs as well as the machinations of a co-defendant, may affect the timing of negotiations, frequently counsel would be wise to delay any attempt to resolve the case in order to utilize the first meeting with the prosecutor to discover more about the state's case. The wisdom of such a delay depends on the case and the context or course of that initial negotiating session. As explained earlier, the key to effective negotiation not only is determining what one's specific goals are in any bargaining session and discussing with the client anticipated responses, but then being able to respond to changing circumstances as negotiations unfold. Moreover, even if counsel receives an offer that counsel knows is acceptable to the client, it may be wise to delay any acceptance of that offer until a later meeting. Once again, counsel's decision depends on the circumstances, including the risk of the offer being withdrawn, and the client's wishes.

Usually it is not desirable to have the client actually participate in the bargaining session. Criminal defense lawyers generally prefer not to have the client present since the client's facial expressions or remarks may undermine counsel's efforts. Nevertheless, in rare instances, a properly prepared defendant can be instrumental in securing a good outcome.

Many texts on negotiation stress the importance of negotiating on one's own turf. Rarely is this possible in the criminal context. In the vast majority of cases, negotiations will occur in a courtroom, the hallway of the courthouse, or in the prosecutor's office. The setting as well as the extent to which the prosecutor is focused on plea bargaining may influence counsel's ability to obtain a favorable result. It may be desirable to catch the prosecutor in the back of a courtroom and strike a deal when the prosecutor is not really attentive to the task at hand. On the other hand, defense counsel must be mindful not to allow herself to be caught off-guard and to negotiate a case when counsel is not fully prepared to do so. A skilled ,negotiator will manipulate the timing of events and the setting to maximize that lawyer's advantage. Moreover, it is usually best to avoid negotiating under pressure to make a decision unless counsel is in the best position to take advantage of that pressure.

In some cases, it may be desirable to approach the prosecutor with a proposed bargain rather than wait for the prosecutor to make an offer. Research suggests that there is a positive correlation between a negotiator's original demand and her final outcome. Thus, defense counsel may be undercutting herself if her initial settlement proposal is too reasonable or too modest. If defense counsel decides to present an initial settlement proposal, counsel should consider demanding the most extreme position she can rationally defend. On the other hand, if counsel's proposed settlement offer is wholly unrealistic, the offer may be counterproductive. The prosecutor may either dismiss counsel as incompetent or inexperienced or respond by refusing to offer any concessions. The decision to make an initial proposal and the crafting of that proposal depends, therefore, on counsel's assessment of the best overall negotiating strategy to employ in that particular case.

Counsel's overall strategy also dictates the selection of other negotiating techniques or tactics to use in a particular case. Because in most cases thc prosecutor wields superior bargaining power, defense counsel generally will be attempting to utilize persuasive arguments, rather than threats, to gain concessions from the prosecutor. Counsel's ability to strike a responsive chord with an innovative or emotional presentation may succeed in moving a cynical prosecutor to offer a more favorable bargain.

In other instances, defense counsel's ability to extract a reasonable offer or settlement turns on counsel's success in convincing the prosecutor that the defense actually is willing to go to trial. In a substantial number of cases, the threat to go to trial is hollow and has little impact on the prosecutor. In some cases, however, defense counsel's confident insistence that she really has no alternative but to try the case may cause the prosecutor eventually to offer a settlement that is more favorable to the defense than the case really warrants. Defense counsel's reputation and skill as a trial lawyer combined with a demonstrated willingness to go to trial, if necessary, often is the key to counsel 's success as a negotiator. Indeed, if counsel is able to convince the prosecutor that a trial will be a costly, hard-fought battle, the prosecutor may conclude that even though he or she will win in the end, the victory may not be worth the effort expended.

Although occasionally counsel's candid assessment that she is looking to resolve the case may be a useful step in securing a reasonable outcome, it may also signal to a prosecutor that the defense is simply unwilling to go to trial. For some prosecutors, this knowledge allows them to drive a particularly harsh bargain. Defense counsel who clearly signals an unwillingness to go to trial may find herself at the mercy

of the prosecutor. Asking for mercy is rarely the approach of choice. Rather, counsel must ensure that her cooperative gestures are seen as principled concessions to reach a fair bargain, not a sign of weakness, anxiety or fear.

In cases in which the defense has substantial leverage, counsel should give the prosecutor an opportunity to save face if possible. Emphasizing in a bargaining session the existence of facts not known to the prosecutor's office when the initial charging decision was made permits the prosecutor to utilize those facts to dismiss the case. Thus, even though the initial charging decision may have been a horrendous one, the second prosecutor is able to justify the dismissal without taking a slap at a fellow prosecutor.

In other instances, however, defense counsel may have the leverage to insist upon a dismissal or favorable bargain that is hard for a prosecutor or prosecutor's office to swallow. Although the prosecutor may lack leverage in this particular instance, he or she may pressure defense counsel to enter into a reasonable plea bargain so as to not embarrass or cause a political problem for the prosecutor's office. The pressure on defense counsel may be intense, particularly if it is combined with a veiled threat by the prosecutor to keep this case in mind in future negotiating sessions. Unquestionably, defense counsel will be called upon to make tough choices. Nevertheless, because counsel represents an individual defendant, not a particular cause or future clients, she is obligated to secure the best result possible for a client even though it may negatively impact future clients.

III. After The Music Has Stopped: *Learning From One's Negotiating Experience*

Defense counsel cannot unilaterally accept or reject a prosecutor's settlement offer. Rather, counsel must fully discuss with her client any settlement offer made by the prosecutor even if counsel believes that the prosecutor's settlement offer is unacceptable or not in the client's best interests. Counsel must provide sufficient advice, including a realistic assessment of the probable outcome if the plea bargain is rejected and the case tried, so that the client can make an informed decision. It is then up to the client to make the decision whether to accept or to reject the offer.

ABA Standard 4-5.1 calls for the defense lawyer to "advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome," but cautions counsel "not to intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." As all experienced lawyers know, the manner in which the pros and cons of a plea bargain or any settlement offer are communicated to a client shapes the client's ultimate decision. It is critical, therefore, that defense counsel be mindful of the systemic pressures described in this article when counseling a client regarding a proposed plea bargain.

For example, many defendants, especially first offenders, are reluctant to go to trial if exercising that

option raises the possibility of a jail sentence. For many defendants, the prospect of going to jail is so unnerving that they will agree to almost anything if the negotiated disposition guarantees that the defendant will not serve any jail time. When explaining options to a client, therefore, defense counsel should avoid unduly emphasizing the risks of incarceration. Although the lawyer must advise the client of the likely adverse consequences of a proposed course of action, she should do so in a way that does not cause the client to fixate on the small risk of incarceration. Like the doctor who overplays the small risk of an adverse side effect thereby causing the patient to reject a very safe medical procedure, the lawyer who unnecessarily focuses the client's attention on the risk of jail may discourage the client from pursuing an alternative that really is in the client's best interest.

It is improper for counsel to allow her own needs or interests to affect her presentation of the client's options. If counsel feels strongly that the client's best interests will be served by selecting a particular option, she may use a reasonable persuasion to guide the client to a sound decision." Sometimes that means counsel should encourage the defendant to go to trial. But it also means in some cases that counsel should urge the defendant to accept a plea bargain even though it entails a long prison stint rather than taking a hopeless case to trial. The line between a reasonable persuasion" and manipulation which robs the client of the right to make one's own decisions is, however, not a bright one. Indeed, as Albert Alschuler has accurately described, the defense lawyer's task is often incredibly difficult:

When a lawyer refuses to "coerce his client," he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty that, somehow, it should have been the lawyer's duty to prevent. When a lawyer does "coerce his client," however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve.

So once again, defense counsel finds herself in a difficult bind. It is appropriate to lean on clients to keep them from making poor decisions regarding plea bargains. In my view, how hard counsel can lean turns on the seriousness of the case, the harm facing the defendant, the client's ability to make informed decisions, the certainty of the harm, the client's rationale for his or her decision, and the means used to change the defendant's mind. Defense counsel generally should not be permitted to threaten to withdraw to coerce a defendant into accepting a plea bargain that counsel feels is in the client's best interest. Rather, defense counsel ultimately must respect the individual's constitutional right to turn down a plea bargain and to go to trial, even if that choice is foolhardy. Nevertheless, it may be very difficult for counsel to respect a foolish decision which harms her client, especially for the lawyer defending an accused facing the death penalty.

If the defendant decides to accept an offer, it is important for defense counsel to reduce the agreement to waiting to avoid misunderstandings. Given the volume of cases in most prosecutor's offices, it is particularly important to memorialize the agreement if counsel anticipates that the prosecutor with whom counsel struck the plea bargain may not be in court at the time the guilty plea is entered or she foresees possible confusion about the details of the bargain. A simple confirmation letter to the prosecutor often will be sufficient. In some instances a more detailed written document is appropriate.

A final step that a lawyer should take at the conclusion of a negotiation - for her own sake as well as that of future clients - is to reflect upon the experience and carefully assess what strategies or techniques were effective. Too many lawyers complete a plea bargaining session never stopping to consider what worked or what did not, never thinking about what could have been done differently. As a result, too many lawyers repeat their mistakes and do not even recognize their limitations. Growth and improvement as a negotiator, indeed as a lawyer, comes from learning to extract from one's performances and experiences lessons which can be applied in the future. Law schools have historically not done an adequate job preparing law students to be reflective practitioners. Although most law schools have improved their skills instruction in recent years, many lawyers now in practice were never taught the skill of systematically critiquing or evaluating their own work. Not surprisingly, then, many lawyers have not cultivated this important skill.

The good lawyer will review and evaluate her preparation, her strategy and the negotiation session with an eye toward future negotiations. Good lawyers learn from both their successes and their failures. But the speed and extent of the lawyer's development as a proficient negotiator usually will be a function of her reflective abilities.

The following checklist is provided as a starting point for those interested in acquiring or honing this skill:

Post-Plea Bargain Checklist

1. How good was your:

    a. overall pre-negotiation preparation?
    b. knowledge of law relating to the case?
    c. knowledge of facts?
    d. knowledge of defendant's personal characteristics?
    e. knowledge of defendant's expectations and concerns, especially potential collateral consequences?

2. Did you select a particular negotiating strategy and why?

3. Did you and your client select a certain goal?

    a. Did you achieve that goal?
    b. Did you set a high enough goal?
    c. If you achieved everything you sought, is there reason to believe that your goal was set too low?

4. Did you discover at any time in the negotiation process that any of your pre-negotiation assessment was inaccurate?

5. Did you pick up information during the negotiating process which aided you?
   Could you have done anything during the process to learn more about the prosecutor's strategy, goals or the merits of the state's case?

6. Did you or the prosecutor make any unintended verbal or nonverbal disclosures?

   If so, what prompted those disclosures?

7. Did any contextual factor such as time or location affect the negotiation?

   If so, could you have influenced that factor?

8. Who made the first offer and what prompted it?

9. Who reacted to the first offer and in what manner?

10. Did the prosecutor employ any specific bargaining tactics or techniques?

    If so, how did you react to those tactics?

11. How did the prosecutor react to any techniques you used?

12. Were there other tactics which you might have been able to use to advance your position?

13. Which party made the first concession and how was it handled?

14. If subsequent concessions were made, were they reciprocated? If not, why not?

    Were the concessions "principled" and if so, what did either party articulate?

15. How was the plea bargain finalized?

    Did either side appear to make greater concessions in wrapping up the bargain?

16. Did each side initially bargain competitively?

If not, which side did not?

Did either party switch to a cooperative/integrative approach?

If so, which party and why?

Were both parties bargaining cooperatively at the end?

If not, why not?

17. Did time pressures influence either side or the concessions made?
    If so, could you have used this factor to your advantage?

18. Did you "bluff"?

    If so, how?

    Do you think the prosecutor "bluffed"?

    If so, how?
    Is there anything you could have done to unmask the "bluff"?

19. Did you resort to any misrepresentation of fact or law?

    Is there any reason to suspect that the prosecutor may have?

20. Who do you think got the more favorable plea bargain and why?
    Is there anything else you could have done to achieve a more favorable outcome for your client?

This is a modified version of a post-negotiation checklist suggested by Craver, *Effective Legal Negotiation & Settlement* 2 (2d ed. 1993) at 212-14.

Conclusion

Unquestionably, the criminal defense lawyer has an obligation to try to secure the best possible result for each client counsel represents. For the vast majority of clients, defense counsel's task eventually will be to obtain the best plea bargain possible. The lawyer committed to providing quality representation, therefore, must learn to be an effective negotiator. Effective negotiating, like good card playing, requires sound judgment, intuition, the ability to read the other players and the flexibility to adapt to a changing context. And like success in cards, success in negotiations depends in part on luck but more on preparation, study and reflective decision-making. In the end, the defense lawyer who takes the time to

prepare and then to tailor an individualized approach is more likely to obtain better plea bargains.

Finally, the criminal practitioner who takes the time after each plea bargaining session to carefully analyze that session in an effort to determine what worked or did nor work and the reasons for her success or failure is likely to improve as an negotiator. Finding the time to be reflective is not easy. And, as with most things in life, becoming a good negotiator takes hard work. In the end, however, that time and hard work will pay enormous dividends for the criminal defense lawyer and her clients.

Selected Sources

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Pennsylvania Board of Probation and Parole, v. Scott
118 S.Ct. 2014 (6/22/98)

A closely divided Supreme Court has held that the exclusionary rule does not apply in a parole revocation hearing, thereby allowing for the admission of illegally seized evidence to secure a revocation.

Scott was on parole in Pennsylvania. Upon being granted parole, he signed a consent to search without a warrant. He was later arrested, and his home was searched without a warrant. The search produced several firearms, which Scott was prohibited from possessing. Scott's parole was revoked based upon the evidence found. On appeal, the Pennsylvania Supreme Court affirmed the lower court holding that the evidence was admitted erroneously. The Court ignored Scott's "consent to search" form, found the search to have been illegal, and held that the exclusionary rule applied to parole revocation hearings. Specifically, the Court reasoned that without the exclusionary rule, police officers would not be deterred from Fourth Amendment violations. The State obtained review from the U.S. Supreme Court.

The five-justice majority opinion was written by Justice Thomas, joined by Justices Rehnquist, O'Connor, Scalia, and Kennedy. The Court reiterated its fundamental understanding of the exclusionary rule: that "the States' use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." "The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures."

The Court also restated that the evaluation of the applicability of the exclusionary rule utilizes a balancing of the deterrent effect with the "'substantial social cost[s].'" The Court stated that the exclusionary rule would "hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings," thereby producing a significant social cost. The deterrent benefit would be insubstantial "because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches." Therefore, "the federal

exclusionary rule does not bar the introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights."

The Court rejected the Pennsylvania Supreme Court's effort to fashion a special rule where the officer knew that the person being searched was a parolee, or where the officer was, for example, a parole officer. The Pennsylvania Court had carved out this special rule due to the deterrent effect on these particular officers. The Supreme Court, however, stated that a police officer who knew the defendant was on parole would still be deterred by the application of the exclusionary rule to a criminal trial. The deterrent effect to the parole officer would be "limited" due to the fact that the parole officer is viewed, at least by the Court, as more of a supervisor and less of police officer. "Although this relationship does not prevent parole officers from *ever* violating the Fourth Amendment rights of their parolees, it does mean that the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of damages actions."

There were four dissenters. Justice Stevens wrote a short dissent, stating that the exclusionary rule is constitutionally required by the Fourth Amendment. He expressed his oft-stated view originating with Justice Stewart that the rule is required "'as a remedy necessary to ensure that those prohibitions are observed in fact.'"

Justice Souter also wrote a lengthy dissenting opinion, joined by Justices Ginsburg and Breyer. According to the dissenters, the majority missed the mark by misunderstanding the nature of a parole revocation hearing, which in many instances is the main event. "In reality a revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the State will seek to use evidence of a parole violation, even when that evidence would support an independent criminal charge. The deterrent function of the exclusionary rule is therefore implicated as much by a revocation proceeding as by a conventional trial, and the exclusionary rule should be applied accordingly."

The dissenters also recognized that parole officers are not necessarily the "supervisor" of the parolee, friends disinclined to break the Fourth Amendment in order to obtain evidence with which to revoke the parolee. "Parole officers wear several hats; while they are indeed the parolees' counselors and social workers, they also "'often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees.'" "In sum, if the police need the deterrence of an exclusionary rule to offset the temptations to foget the Fourth Amendment, parole officers need it quite as much."

A few comments are appropriate. This opinion reflects the continued sad decline in Fourth Amendment protections that began with *Gates* and continues to this day. It reflects the Court's continued deference to the police, to law enforcement, to prison officials, and to the special needs of each. The opinion further reflects the Court's absence of sensitivity to the Fourth Amendment rights of prisoners and parolees that began with the *Griffin* decision. The fact that Justice Stevens is the only Justice left who believes the exclusionary rule is constitutionally required demonstrates how far the Court has gone from *Mapp v. Ohio*. Finally, the opinion does not address the increasingly common experience of parole officers acting with police officers(recognized by the dissenters) to conduct warrantless searches of parolees. Under this new ruling, such searches, accomplished with no intent to prosecute but every intent to revoke, would be legal and the evidence seized would be entirely admissible at a parole revocation hearing.

Wilson v. Commonwealth
96-CA-003469-MR
(Ky.Ct.App. 6/12/98)
Not Published

The Kentucky Court of Appeals has decided that a person on parole can have his car searched upon reasonable belief

where he has consented to searches as a condition of his parole.

Israel Wilson was on parole, having agreed that while on parole he would be "'subject to search and seizure if my [parole] officer has reason to believe that I may have illegal drugs, alcohol, volatile substance, or other contraband on my person or property." Wilson was at a halfway house when two parole officers visited to arrest him for parole violation. He was patted down, and $373 was found, which he attributed to his job, which he had had for a week. When he asked to call someone to move his car, the parole officers decided to search the car, where they found marijuana and a scale. Wilson eventually entered a conditional plea of guilty to trafficking in marijuana within 1000 yards of a school and being a PFO 2nd.

On appeal, in a unanimous decision written by Judge Huddleston, the Court found the search to be reasonable. The Court relied upon *Griffin v. Wisconsin*, 483 U.S. 868 (1987), which had held that parole searches were a special needs search, and as such could be conducted under a reasonable belief rather than probable cause standard. "Like the Supreme Court in *Griffin*, we believe that the operation of the parole system presents 'special needs' beyond normal law enforcement. The parole system allows for the early release of convicted criminals from prison, but does not grant complete freedom. It is imperative that the Commonwealth impose conditions of release on parolees to ensure that parole is a period of genuine rehabilitation and that those released on parole do not become a threat to the community."

The Court went on to find that the officers had a reasonable belief that Wilson was committing a crime. This was based upon the fact that he had considerable cash in his possession after having been on the job for a short period of time, that he was wanting to call someone to move his car, that he had been incarcerated on drug charges, and that he was in the halfway house due to having tested positive.

United States v. Reed

141 F.3d 644 (6th Cir. 4/15/98)

Joseph Reed, a convicted drug trafficker, lived in a downstairs flat in Mansfield. One night, an alarm went off there, and the residents of the upper flat called the police, who arrived within three minutes. A canine team was called, and shortly thereafter "Cheddy" and his handler arrived. Reed arrived, and agreed that it was a good idea to send in the dog after the burglar. The handler and Cheddy went inside. While the dog was trying to find the intruder, he alerted at the couch and the bedroom dresser drawer. Cheddy knocked the drawer off its runner. The handler noticed a bag with cocaine in it. Once the handler found no burglar, the all clear was given. More officers arrived to conduct a more extensive search. Reed then declined to give his consent for a search, and was placed under arrest. Officers obtained a warrant to search the flat thoroughly. During the execution of the warrant, more drugs were found.

Reed was charged in federal court with being a felon in possession of a firearm, and with possessing with intent to distribute cocaine. Reed challenged the search, but lost his motion after a four-day hearing. After a three-day trial, he was found guilty and appealed to the Sixth Circuit.

The Sixth Circuit affirmed the trial court's order overruling the motion to suppress. The opinion was written by Judge Ryan and joined by Judge Siler and Judge Wellford.

The analysis performed by the Court was straightforward. Essentially, the Court found that the police officer was where he had a right to be when he saw contraband in plain view. The Court found the officer had a right to be in Reed's house as a result of both the burglary in progress, and Reed's consent to the canine search.

The Court held that the canine search itself was not a search within the Fourth Amendment. "Just as the sniffing of

contraband by trained canines does not constitute an unlawful search, neither does the viewing by humans of contraband in plain sight amount to an unlawful search. As long as the observing person or the sniffing canine are legally present at their vantage when their respective senses are aroused by obviously incriminating evidence, a search within the meaning of the Fourth Amendment has not occurred."

The Court rejected authority from the Second Circuit that holds that the search of a private residence by a canine is different from a public search as represented in *United States v. Place*, 462 U.S. 696 (1983). In *United States v. Thomas*, 757 F. 2d 1359 (2nd Cir. 1985), the Court had held that "the heightened privacy interest in a dwelling place renders a canine sniff intrusive on the inhabitant's expectation of privacy, even with respect to contraband." The Sixth Circuit rejected this notion, saying, "there is no legitimate interest in 'privately' possessing cocaine...We now take the opportunity to clarify that a canine sniff is not a search within the meaning of the Fourth Amendment. Of course, the canine team must lawfully be present at the location where the sniff occurs."

Judge Wellford wrote a brief concurrence. While he agreed with the result, he did not agree with the majority's rejection of the *Thomas* case. He would establish that in some circumstances, a dog sniff can constitute a Fourth Amendment search.

United States v. Strickland

144 F.3d 412 (6th Cir. 5/20/98)

The issue in this Sixth Circuit case is whether "the Fourth Amendment's requirement of probable cause for an arrest is satisfied when, in effecting an arrest of a suspected drug dealer, police officers rely solely on the statements of an informant as to the manner in which the planned drug deal would take place and on certain occurrences the officers observe at the time and place of the planned drug deal that appear to corroborate the informant's statements."

Haggard was an informant for the Chattanooga, Tennessee police. Haggard, seeking cocaine, placed a phone call, which was taped, to his brother-in-law. The brother-in-law suggested that Haggard contact Strickland. Haggard called Strickland, although the conversation was not taped. They agreed to meet at convenience store. Haggard told the police that they had agreed to purchase one ounce of cocaine for $1000. The police gave Haggard $1000 in marked bills.

The police then staked out the convenience store. Haggard wore a wire. Strickland arrived with two other men. Strickland approached Haggard in his car, got into Haggard's car, and then went back to his car. The police then decided to arrest Strickland, who said, "'I ain't got no dope.'" Haggard had cocaine thereafter, while Strickland had the $1000 in marked bills.

Strickland sought to suppress the evidence. The magistrate found that the police had probable cause to arrest and search Strickland. The district court affirmed the magistrate.

The Sixth Circuit agreed with the court below. In a decision by Judge Boggs, the Court held that probable cause existed under the *Illinois v. Gates*, 462 U.S. 213 (1983) standard. The Court observed that "the corroboration of a certain amount of information provided by an informant can be sufficient to establish probable cause to arrest and search a criminal suspect...Armed with two taped conversations of known drug dealers who identified Strickland as a potential source of cocaine, an informant's account of a conversation in which Strickland agreed to meet Haggard at a certain time and place to sell him cocaine, and the independent observation of Strickland's arrival at the Corner Market with associates who did not accompany Strickland into Haggard's car, the police decided to arrest Strickland. We hold that, on these facts, the officers had probable cause to do so."

Short View

1. ***State v. Kieffer***, 577 N.W.2d 352 (Wis. Sup. Ct. 5/12/98). The police failed to ask enough questions when they received permission to enter and search from a man who owned a house and a garage with a loft apartment above it. The loft was occupied by the son-in-law of the owner of the property. The son-in-law and his wife paid some rent and had the only keys to the apartment. The Court rejected the State's argument that the fact that the couple used the bathroom and the phone in the house produced actual authority in the father-in-law to consent to the search. Actual authority requires either "mutual use of the property by persons having joint access and control from most purposes." *U. S. v. Matlock*, 415 U.S. 164 (1974). Further, the Court rejected the apparent authority doctrine, saying that the police needed to ask more before they could have believed reasonably in the father-in-law's apparent authority to consent to the search.
2. ***United States v. Hotal***, 143 F.3d 1223 (9th Cir. 5/11/98). The Ninth Circuit has decided that anticipatory warrants must have the affidavit attached to the warrant at the time of the execution. The purpose of this is in order to identify the conditions which will trigger the execution of the warrant in order to identify the particularity requirement. "We conclude only that the necessary conditions must appear in the court-issued warrant and attachments that those executing the search maintain in their immediate possession in order to guide their actions and to provide information to the person whose property is being searched."
3. ***Hulse v. State***, 961 P.2d 75 (Mont. 5/5/98). The Montana Supreme Court has reversed a previous decision and held that a field sobriety is a search which requires at least a reasonable suspicion. Previously, the Court had held that it was an observation that required no level of suspicion whatsoever. The Court noted that "field sobriety tests create a situation in which police officers may observe certain aspects of an individual's physical and psychological condition which would not otherwise be observable."
4. ***Nelson v. Irvine, Calif.***, 143 F.3d 1196 (9th Cir. 5/6/98). The Ninth Circuit has held that where a state court has declared breath and urine tests as effective as a blood test, that it is unreasonable to mandate a blood test when a driver makes his preference for another test known. This holding is in the context of a 42 USC 1983 lawsuit against a city.
5. ***State v. Lee***, 959 P.2d 799 (Ariz. 5/28/98). The Arizona Supreme Court has held that drug courier profile evidence is not admissible as substantive evidence in a criminal trial. This evidence, often admitted at suppression hearings, was admitted at an Arizona trial to prove the knowledge element of the offense. The Court called such evidence a "loose assortment of general, often contradictory, characteristics and behaviors used by police officers to explain their reasons for stopping and questioning persons about possible illegal drug activity."
6. ***United States v. Rowland***, 145 F.3d 1194 (10th Cir. 6/2/98). In another anticipatory warrant case, the Court held that it was not reasonable to assume that a person picking up child pornography will take that package to his home allowing for a search of the home. Rather, there must be a nexus between the package and the home for the anticipatory warrant to be legal. "The magistrate must ensure that the judicial function of determining the existence of probable cause is not improperly delegated to government agents by relying on police assurances that a search will not take place unless there is probable cause." The evidence was saved, however, by the application of the good faith exception.

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Open Only to Criminal Defense Advocates

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The Advocate, Vol. 20, No. 5 (September 1998)

West's Review

Julie Namkin
Assistant Public Advocate

Commonwealth v. Howard and
Vaughn v. Commonwealth,
969 S.W.2d 700 (Ky., 6/18/98)
Daviess Circuit Court and Laurel Circuit Court

These two cases were consolidated because they involve the same issue: whether the Juvenile DUI Statute or the Zero Tolerance Law, KRS 189A.010(1)(e), is constitutional. The statute states:

> A person shall not operate or be in physical control of a motor vehicle anywhere in this state ... while the alcohol concentration in his blood or breath is 0.02 or more based on the definition of the alcohol concentration in KRS 189A.005 if the person is under the age of twenty-one.

Because driving an automobile is not a fundamental right but a legitimately regulated privilege, and automobile drivers under the age of twenty-one do not constitute a suspect class, the Kentucky Supreme Court reviewed the constitutionality of the above statute under the rational basis analysis. The Court concluded the statute does not violate the state and federal guarantees of equal protection.

In concluding the line drawn by the legislature is rational, the Court observed that individuals in the class covered by the statute are not able to purchase liquor legally and also the legislature has recognized, in other contexts, "a maturity difference between 18 year olds and 21 year olds in a number of [Kentucky] statutes." The Court also concluded the classification is related to achieving the legislative purposes of reducing the number of teenage traffic fatalities and protecting the public.

Sholler v. Commonwealth,
969 S.W.2d 706 (Ky., 6/18/98)
Kenton Circuit Court, Judge Douglas Stephens

Ralph *Sholler* was convicted of two counts of first degree robbery, two counts of first degree rape, two counts of first degree sodomy, first degree burglary, and being a first degree persistent felony offender. The jury fixed his sentence at twenty years on each of the underlying felonies and then enhanced the sentences to life imprisonment pursuant to the first degree persistent felony offender conviction.

On appeal, *Sholler* raised the following issues.

First, *Sholler* argued the trial court erred in failing to strike two potential jurors for cause. One prospective juror was a retired Secret Service Agent who was presently employed part time at a hospital where he was acquainted with a nurse who would be a witness in the case. The prospective juror indicated upon questioning by defense counsel that he was "very pro-law enforcement and that he placed substantial credence in police officers." Finding that the trial court did not abuse its discretion in failing to strike this prospective juror for cause, the Kentucky Supreme Court stated that although the individual "indicated he would tend to give credence to the testimony of a police officer, [the individual] did not indicate a bias against defendants." The Court also pointed out that police testimony "played only a lesser role in the prosecution's case" because the case was based primarily on the victims' eyewitness identification and testimony.

The Court also found the prospective juror's "mere work relationship" with a "peripheral witness" to be insufficient to establish bias to support a challenge for cause.

The second prospective juror knew the prosecutor socially through mutual friends and their mutual membership in a large card club. The prospective juror stated she might play cards with the prosecutor once a year and her relationship with him was not such as to make it difficult for her to serve as a juror and would not make her uncomfortable to render a verdict for the defendant. The Court found the definition of bias "does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality." Thus, the trial court did not abuse its discretion in overruling defense counsel's motion to strike this prospective juror for cause.

Second, *Sholler* argued the testimony of Commonwealth witness Stacey Warnecke, a forensic scientist specializing in DNA testing, as to the DNA test results should have been suppressed in the absence of accompanying testimony from a population geneticist. Warnecke testified the DNA from the semen samples removed from the female victim's eyebrow and thigh matched four of the five DNA strands taken from a blood sample from *Sholler*. Warnecke also testified a "match" does not mean that *Sholler* must have been the source of the semen samples, but only that *Sholler* was not excluded as the source. *Sholler* argued that testimony of a genetic "match" cannot be introduced without proof of the significance of that conclusion.

The Kentucky Supreme Court noted that Warnecke's testimony did include an explanation of the significance of a DNA "match," even if it was just that the results of the testing did not exclude *Sholler* as a possible source of the semen. The Court viewed Warnecke's testimony "as similar to that of an expert who testifies that a defendant's blood type is the same as that of a blood sample found at a crime scene." The Court found Warnecke's testimony was "just another item of circumstantial evidence to be weighed by the jury."

Finally, the Court stated that if *Sholler* "desired additional evidence of statistical probabilities based on Warnecke's test results, he could have hired his own population geneticist to analyze the results and

testify to those probabilities.

Third, the Court refused to address *Sholler's* argument that it was error for the trial court to exclude the testimony of a psychologist, who would have testified to factors which cause eyewitnesses to make inaccurate identifications, because it was not properly preserved for review with an avowal.

Fourth, *Sholler* argued it was error for the trial court to deny his motion to allow the jury to view the crime scene at night so it could determine whether the lighting conditions were such that the victims were able to make an accurate identification of *Sholler*. The Court held it was not an abuse of discretion to overrule *Sholler's* motion because *Sholler's* argument was pure speculation and could not have been proven by a view.

Fifth, the Court found that *Sholler's* right not to incriminate himself was not violated when the trial court granted the prosecutor's request that *Sholler* display his teeth for the jury after a defense witness testified on cross-examination that *Sholler* spoke with a lisp and was missing a front tooth. These facts had not been mentioned by the victims.

Sixth, *Sholler* claimed that Det. Stanley indirectly commented on his right to remain silent when he testified he went to police headquarters to "hopefully get an interview with the suspect." Stanley did not testify whether he did or did not interview *Sholler*. The Court held that since there was no objection to Stanley's testimony, this issue was not preserved for review. Even if it had been objected to, the Court did not believe the comment was likely to draw the jury's attention to the defendant's silence.

Seventh, the Court rejected *Sholler's* cumulative error argument since it found no errors had occurred at his trial.

Sholler's convictions and life sentence were affirmed.

Commonwealth v. Bailey,
970 S.W.2d 818 (Ky.App., 5/29/98)
Nicholas Circuit Court

Bailey was convicted of flagrant non-support (KRS 530.050) and served his two year sentence. Upon his release from prison *Bailey* did not make any payment on the accrued past due child support. As a result, upon the Commonwealth's motion, the circuit court issued a show cause order for *Bailey* for civil contempt for his failure to pay the past due child support. When *Bailey* failed to comply with the court's order, a warrant was issued for his arrest. After a hearing, the court dismissed the Commonwealth's motion to hold *Bailey* in civil contempt for failure to make payments on the past due child support. The court found, based on double jeopardy principles, that *Bailey's* "criminal conviction and subsequent service of sentence preclude[d] further incarceration for the same conduct, *i.e.,* failure to pay the same child support obligation." The Commonwealth appealed.

The Court of Appeals held that *Bailey's* criminal conviction did not preclude civil action against him to collect the past due child support. The Court of Appeals stated the trial court was in error when it found that double jeopardy principles precluded additional incarceration of Bailey on civil contempt charges. The Court of Appeals held the case must be remanded to the trial court for a hearing at which it is determined whether *Bailey* had made any attempt to comply with the court's order to pay the past due child support and whether *Bailey* has the financial ability to make such payments in the future in an effort to comply with the court's order. If *Bailey* is found to have the ability to pay, and thereby possesses the financial means to purge himself of contempt, the court can then find him to be in civil contempt and may imprison him to compel compliance with its order. If the court finds *Bailey* lacks the ability to pay, the court may, in its discretion, fashion a remedy to address the arrearage still owed.

Crace v. Commonwealth,
(Ordered not to be published 2/10/99)
(Ky.App., 6/12/98)
Boyd Circuit Court

Crace was originally indicted for bribery of a public servant, receiving stolen property, obscuring the identity of a vehicle and second degree assault. After a jury trial, Crace was acquitted of obscuring the identity of a vehicle and receiving stolen property. The jury hung on the bribery and the assault charges.

Prior to the second trial, the Commonwealth moved for a change of venue which was granted. At this trial Crace was convicted of bribery of a public official and fourth degree assault. He was sentenced to four and one half years on the bribery charge and twelve months on the assault charge to run concurrently. He raised four issues on appeal.

First, Crace argued the trial court erred when it failed to instruct the jury on the affirmative defense set out in KRS 521.020(2) which is meant to prevent public officials from "shaking down" individuals. However, the Court of Appeals stated the record evidence showed it was Crace, through his friend Fields, who first approached the Commonwealth's Attorney with an offer of payment in exchange for dismissing the indictment against him. Thus, the trial court's determination that the evidence did not warrant such an instruction was correct.

Second, Crace argued the trial court abused its discretion in granting the Commonwealth's motion for a change of venue, but the Court of Appeals found no abuse of discretion. Moreover, there was nothing improper in the trial court moving the trial to a county that did not adjoin Johnson County.

Third, Crace argued the trial court erred when it failed to suppress the tape recorded conversations between Crace and the Commonwealth's Attorney. Crace argued the Commonwealth Attorney violated SCR 3.130(4.2), which prohibits direct contact by a lawyer to an individual regarding the subject matter of the representation when the lawyer knows the individual is represented by counsel in the matter. The Commonwealth's Attorney contacted Crace pursuant to a "sting" operation involving bribery for which Crace had not yet been formally charged. Thus, there was no contact regarding the subject matter of the

representation since Crace had not yet been formally charged and did not require representation at that point. The Court of Appeals held that SCR 3.130(4.2) was inapplicable because prosecutorial authorities involved in "sting" operations are not required to route communications in furtherance of the "sting" through the suspect's attorney. Moreover, the Court of Appeals pointed out that the purpose of the provisions of the Code of Professional Responsibility are internal regulations prescribing the standards of conduct for members of the bar. The remedy for a violation of a provision of the Code of Professional Responsibility has traditionally been internal bar disciplinary action against the offending attorney, not the suppression of evidence at trial. Thus, the trial court was correct in refusing to suppress the evidence.

Fourth, Crace argued the trial court erred when it failed to grant his motion for a mistrial when evidence of the prior crimes, of obscuring the identity of a vehicle and receiving stolen property, of which he had been found not guilty at the first trial, was introduced at the second trial. The Court of Appeals held the evidence was properly introduced to prove Crace's motive for the assault since it was after the police had impounded Crace's vehicle for not having a VIN number, a valid title or a bill of sale, that Crace assaulted the individual who had worked on the impounded vehicle. In addition, the trial court twice admonished the jury regarding the limited scope of the evidence.

Accordingly, Crace's convictions were affirmed.

Wilson v. Commonwealth,
96-CA-003469-MR (Not Published)
(Ky.App., 6/12/98)
Fayette Circuit Court

Wilson was arrested after violating his parole a second time. Before Wilson was transported to jail from the halfway house where he resided, the parole officers searched Wilson's car. In the trunk they found several bags of marijuana and a scale. This discovery led to charges of trafficking in marijuana within one thousand yards of a school and being a second degree persistent felony offender.

Wilson claimed the warrantless search of his car by the parole officers violated his Fourth Amendment and Section Ten rights and moved to suppress the evidence seized from his car.

At the suppression hearing the parole officers testified Wilson consented to the search of his car, but Wilson denied he had given consent.

One of the conditions of Wilson's probation, to which Wilson had agreed, was to be subject to search and seizure based upon a parole officer's "reasonable belief" that Wilson had contraband on his person or property. Thus, the trial court found that Wilson's consent to search his car was not necessary.

At the suppression hearing, the trial court concluded that for the seized evidence to be admissible, the Commonwealth had to show the parole officers' had a "reason to believe" Wilson had contraband in his car. This standard is a lesser standard than probable cause.

The trial court found the following facts were sufficient to demonstrate the parole officers' had a reasonable belief that Wilson had contraband in his car: 1) Wilson had $373.00 on his person at least a week after being paid and none of his prior paychecks had been more than $317.00; 2) after being arrested, Wilson asked the officer if he could call someone to pick up his car; and 3) Wilson had been incarcerated on drug charges when he was paroled and his first parole violation was for testing positive for drugs. Thus, the trial court denied Wilson's motion to suppress and Wilson entered a conditional guilty plea to the charged offenses.

The Court of Appeals affirmed the trial court's order denying Wilson's motion to suppress.

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The Advocate, Vol. 20, No. 5 (September 1998)

DPA Personnel

APPOINTMENTS

Doug Crickmer, Assistant Public Advocate
Frankfort Trial Office as of 4/16/98
Received J.D. from Univ. of North Dakota 1993

Harry Creamer, System Support Technician
Law Operations in Frankfort Office as of 5/1/98
Received B.S. from Thomas Moore College 1993

Sally Wasielewski, Assistant Public Advocate
Juvenile Post-Dispositional Unit
Henderson Office as of 5/1/98
Received J.D.from U.K. School of Law in 1989

Sauda Brown, Secretary
Capital Trial Unit, Frankfort Office as of 6/1/98

Fred Johnson, Assistant Public Advocate
Covington Office as of 6/16/98
Received J.D. from Chase Law School in 1997

Glenn McClister, Assistant Public Advocate
Somerset Office, as of 8/1/98
Received J.D. from U.K. School of Law in 1997

Clay Bedford, Assistant Public Advocate
Pikeville Office as of 8/1/98
Received J.D. from Syracuse University in 1977

TRANSFERS

Barbara Carnes, Assistant Public Advocate
Transferred from Hazard Office to Henderson Office as the Directing Attorney as of 8/1/98

RESIGNATIONS

Melinda Sears, Investigator
Pikeville Office on 6/2/98
Employed with DPA since 8/96.

Melissa Bellew, Assistant Public Advocate
Elizabethtown Office as of 8/14/98
Employed with DPA since 8/91.

Don Muir, Paducah, Defender of 12 Years Passes Away

Don Muir, 61, passed away at Vanderbilt Hospital in Nashville on July 21, 1998. Don underwent surgery in June 1998 for esophageal cancer.

Don Muir

DPA Paducah directing attorney, Carolyn Keeley, observed, "Don has been with the Department of Public Advocacy for a long time and many of you have known and worked with him. He was a truly nice man and loved by all who knew him. He was our 'grand ole man' who knew everything about everyone in Western Kentucky. Always quiet. Always a gentleman. He always got the job done and in the most extraordinary ways. He leaves a very big hole in our Paducah DPA defense team and our hearts."

Don started with DPA on July 1, 1986. He served as directing attorney of the Paducah Office from March 1, 1989 until December 15, 1994, and was a senior litigator there since then. He graduated from Vanderbilt University in 1959 and from the U.K. College of Law in 1965.

At the memorial service for Don at the Reidland United Methodist Church where he was a member of the fellowship, the minister said, "Don stood up for his clients and made a difference for them." At the service, friends of Don talked about his gentleness. A Paducah Detective talked about how Don would dig his heels in for his clients but always in a professional way. Don is survived by his wife Marian who works in the circuit clerk's office and three children, one of whom is a Paducah police officer. Public Advocate Ernie Lewis said, "We will miss Don greatly and will be thinking of his family and the staff of the Paducah office."

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Changes in Truth-in-Sentencing

At the recent Annual Seminar, Public Defenders from all over the Commonwealth began to address the changes in criminal defense practice that are coming as a result of the Governor's Crime Bill. Three of the most experienced trial lawyers in the state addressed the changes in Truth-in-Sentencing (TIS). This article is a summary of their excellent ideas.

Chris Polk of the Jefferson District Public Defenders Office in Louisville, dealt with the changes coming from the addition of victim impact information to the penalty phase. The legislature added the following language to KRS 532.055: "The impact of the crime upon the victim, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim." As defense practitioners are well aware, prior to this change only the trial court reviewed victim impact material. Now the sentencing jury will see and hear it for themselves.

Chris urged a narrow construction of KRS 421.500, the statute dealing with victim impact materials. The changes in TIS do not now empower a "society representative" to testify at a trial. There must be a victim. 421.500 sets out specific crimes where there are victims. Examples of crimes with victims include homicides, robberies, rape, assault, sodomy, first and second degree burglary, wanton endangerment, stalking, unlawful imprisonment, terroristic threatening, etc. Specifically not included are theft and burglary third degree.

Not everyone can speak as a victim at a sentencing phase. Only one actually injured can qualify. The statutory scheme lays out a hierarchy of order as to who can speak if someone is absent. The scheme must be followed, and is not an open invitation to many people testifying. For example, if the victim is deceased the order is spouse, adult child, parent, adult sibling, grandparent. etc. Only one of these people can speak.

The victim cannot speak about anything they choose. The statute limits the testimony to harm done. The categories of harm are physical, psychological, or financial harm. Emotional harm remains before the Judge, not the jury.

How to deal with the evidence is the toughest question for the defense team. Do we seek psychological records? Seek medical records for things like preexisting conditions? Do we seek an evaluation under the guidelines of *Commonwealth v Mack*, 860 S.W.2d 275 (Ky. 1993)?

The defense attorney must be prepared to deal with direct comments to the defendant. No opinion testimony is permitted at this stage of the proceedings. Opinions and statements concerning desired results can be presented to the Judge at formal sentencing. The rules of evidence apply in the sentencing

phase. The defense attorney should raise issues under KRE 403 where appropriate. Does the probative value outweigh the prejudicial effect?

Examination of the victim must be done with care. The effect on the jury is one issue. Another issue is that doors must not be opened unless intended to be opened. For example, in being a victim of violence has treatment been sought and obtained? Normally not an area to get into, unless the client has been an untreated victim of violence. That may serve to draw contrasts for the jury in seeking leniency.

Finally, Chris reminded everyone that the original statute was unconstitutional. *Reneer v. Commonwealth*, 784 S.W.2d 182 (Ky. 1990) allowed for toleration, but set out a case by case review for abuse. It may be time to revisit the issue.

Steve Mirkin, the Directing Attorney of the Elizabethtown Office, spoke on the possibilities of obtaining funding for the new issues raised under the leniency changes. As of the effective date of the statute, "The defendant may introduce evidence in mitigation or in support of leniency." This is a significant change from prior law.

Steve reminded the listeners that no changes were made in entitlements to KRS Chapter 31 money. There are now more opportunities to use it in a meaningful way outside of death penalty cases. AOC Form 207 (a copy follows this article) [non-reproducible in web edition- ed.] is the form to use to obtain payment, but that is at the end of the case. It is time for more pretrial discovery issues to be raised. You will need more discovery so you will know what you need to meet it. That includes knowing whether or not you need an expert. For example, do you need an occupational therapist to explain the victims condition to the jury so they can better understand it.

Steve also advised that the changes in the statute went beyond adding more evidence. The legislature changed the formerly restrictive definition of mitigation. The legislature added the word leniency. They are different words with leniency perhaps pointing more in the direction of capital case evidence. Cases like *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978) and *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986) should be examined for application. Any records that support dealing with a defendant less severely should be sought. These include school, medical, family, etc.

Finally, Steve urged the audience to consider seeking funding for a mitigation investigator. This obviously would help with other experts, but it also makes sense in light of the changes to seek the assistance of someone trained to present the client's story in the most favorable light possible. Steve urged the use of mitigation assistance especially where the client has themselves been the victim of abuse.

Rodney McDaniel, Directing Attorney for the Frankfort Office, spoke on effective uses of mitigation evidence. Rodney has practiced before a judge that allowed more by the defense than has been the norm in other counties. This experience has allowed Rodney to explore these issues long before the rest of us

will have had to face them.

Rodney began with an exploration of setting up mitigation evidence in the guilt/innocence phase. For example, if one defendant cuts a deal in a case, exploration of the deal as mitigation may prove beneficial. Arguments for consistency in sentencing can be made. The effect of a sentence certainly can be explored. For example the effect that an escape charge will have on classification, especially if a codefendant bargained to get rid of the escape.

Extreme emotional disturbance can be used as a defense in the guilt/innocence phase as well as a topic to revisit in the penalty phase. This is similar to what is found in capital cases.

As the prosecutor brings in evidence of parole eligibility, prior record, and the nature of priors, the defense can respond with family members to explain what happened in those priors. For example, alcohol related priors can be dealt with in terms of subsequent treatment and it's positive effect.

Age presents an area with several possibilities to explore. Long sentences will effect young defendants and old defendants differently. Also how they have done in past incarcerations can help the argument that he will not be as big a burden on society.

Reputation of the defendant in his community is a fertile area to explore. If he has made positive contributions, then seek community members to speak about that. Also, if the victim had a reputation for violence, etc., that can also be pointed out.

Family support is something that often is important to jurors. Examples of visits at the jail, visits while in rehabilitation, financial support, etc. are often helpful. Especially if the family is acknowledging past problems like abuse.

Residual doubt issues are available. If the Commonwealth can rely on all the evidence placed before the jury in the first phase of the trial so can the defendant. Weaknesses in the Commonwealth's case can be reviewed.

Parole statistics is an area that needs revisiting. With the changes in the language of the statute there is no reason not to pursue their introduction.

Expert testimony can be used even if the expert did not find enough to make a defense in the first part of the trial. For example, is your client a follower, not a leader.

Rodney concluded with a reminder that victim impact evidence must be challenged. Perhaps not so much in front of the jury, but long before the jury gets a chance to hear it. There is no substitute for pretrial motion practice.

In reviewing the materials for this article, I urge anyone who has any specific questions to seek out these

attorneys. The changes are significant for the defense practitioner, and more importantly for the client. We have a unique opportunity to remold the law for penalty phases. We must take full advantage of that opportunity.

I have tried to be true to the ideas expressed by Chris, Steve, and Rodney. Any confusion must be in my interpretation.

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Prison Population: Associated Press

Region & Jurisdiction	1997	1996	% Change
U.S. TOTAL	1,244,554	1,183,368	5.2
Federal	112,973	105,544	7.0
State	1,131,581	1,077,824	5.0
U.S. REGIONS			
Northeast	172,244	169,261	1.8
Midwest	216,757	204,657	5.9
South	491,956	469,252	4.8
West	250,624	234,654	6.8

KENTUCKY & ITS NEIGHBORS			
Kentucky	14,600	12,910	13.1
Illinois	40,788	38,852	5.0
Indiana	17,903	16,960	5.6
Missouri	23,998	22,003	9.1
Ohio	48,002	46,174	4.0
Tennessee	16,659	15,626	6.6
Virginia	28,385	27,655	2.6
West Virginia	3,172	2,749	15.4

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KY Department of Public Advocacy

Career Opportunities

Applicants will be required to complete and submit a standard state application form. Parties interested in Staff Attorney positions should submit a resume and writing sample to:

Tim Shull, Recruiter
Department Of Public Advocacy
100 Fair Oaks Lane, Suite 302
Frankfort, Ky 40601
(502) 564-8006 (Phone)
(502) 564-7890 (Fax)
Tim.Shull@ky.gov

All DPA positions are filled according to Kentucky Personnel Cabinet policies. Please contact the DPA recruiter listed above for further position information and current hiring status.

As of November 13, 2003 positions are on a contract basis per the Governor's hiring freeze.

This page is updated around the 10th of each month

The Department of Public Advocacy is currently recruiting for the following positions:

Staff Attorney I -

Bell County

Boone County

Bullitt County

Maysville

Murray

Paintsville

Updated: September 1, 2004

The Advocate, Vol. 20, No. 5 (September 1998)

House Bill 455 Demands Cooperation

- Vertner Taylor

The Probation & Parole Perspective on PSI, Restitution, Pretrial Diversion, Supervision Fee, Sex Offender Registration, Pre-Release

A massive piece of legislation was created with the passage of the Governor's Crime Bill. The Bill covers the implementation of a new Criminal Justice Council to replace the Crime Commission plus the establishment of new penalties and offenses. This article does not allow in-depth coverage of the 212 page document, but rather is an executive summary of the issues that affect the Division of Probation and Parole in the Kentucky Department of Corrections.

Presentence Investigation Report

House Bill 455 states:

The presentence investigation report shall identify the counseling treatment, educational and rehabilitation needs of the defendant and identify community-based and correctional-institutional-based programs and resources available to meet those needs or shall identify the lack of programs and resources to meet those needs.

The Presentence Report for the court will now have included in the evaluative summary information regarding the availability or lack there of, of rehabilitation, treatment and educational programs. The document will highlight what is available in the community and in the institutions. However, the report will not be an alternative sentencing plan. The information that the defendant gives the officer regarding his or her needs will be the areas addressed. For example, if a defendant states they have no problem with drugs or alcohol, but the defendant was under the influence when the crime was committed, the officer will include in his report the drug and alcohol programs available in the immediate area. If a client has a specific need, the probation and parole officer must be made aware of that information.

Restitution

Section 46 - A New Section of KRS Chapter 532: When a judge orders restitution, the judge shall:

1. Order the restitution to be paid to a specific person or organization through the circuit clerk, who shall disburse the moneys as ordered by the court;

2. Be responsible for overseeing the collection of restitution;

3. Set the amount of restitution to be paid;

4. Set the amount and frequency of each restitution payment or require the payment to be made in a lump sum;

5. Monitor the payment of the restitution to assure that payment is being made;

6. If restitution is not being paid as ordered, hold a hearing to determine why the restitution is not being paid;

7. If the restitution is not being paid and no good reason exists therefore, institute sanctions against the defendant; and

8. Not release the defendant from probation supervision until restitution has been paid in full and all other aspects of the probation order have been successfully completed.

Section 47 - A New Section of KRS Chapter 439

1. When there is an identified victim of a defendant’s crime to whom restitution has been ordered but not yet paid in full, or restitution has been ordered paid to a government agency and has not yet been paid in full, the Parole Board shall order the defendant to pay restitution as a condition of parole.

2. When the Parole Board orders restitution, the board shall:

a. Order the restitution to be paid to a specific person or organization through the Division;

b. The Division of Probation and Parole shall be responsible for overseeing the collection of the restitution;

c. Set the amount of restitution to be paid, if not already set;

d. Set the amount and frequency of each restitution payment or require the payment to be made in

a lump sum;

e. Monitor the payment of the restitution to assure that payment is being made;

f. If restitution is not being paid as ordered, institute parole violation proceedings to determine why the restitution is not being paid;

g. If the restitution is not being paid and no good reason exists therefore, institute sanctions against the defendant; and

h. Not release the defendant from parole supervision until restitution has been paid in full.

3. The board, in addition to any other sanctions which may be imposed on the defendant, ask a court to hold a defendant who is not paying restitution in the manner or amount prescribed in contempt of court.

4. Any statute relating to the length of parole supervision notwithstanding, the parole for a person owing restitution shall be until the restitution is paid in full, even if this would lengthen the period of supervision beyond the statutory limit of parole supervision or the statutory limit for serving out the sentence imposed.

5. Payment of restitution in full prior to the end of the period of parole supervision shall not shorten the period of parole supervision.

The issue of restitution has been given new meaning by the Crime Bill. When restitution is ordered by the court or the Parole Board the offender can not be released from supervision until the restitution is paid in full. This in essence could require a person to remain on supervision for life. The law specifies that the person may be supervised past their statutory limit in order to complete restitution. The Division of Probation and Parole expects a tremendous growth in caseloads in the future due to the provision of permanent probation/parole.

One sweeping change that does NOT impact how the Division of Probation and Parole does business is the alternative sentencing language in the Crime Bill. This agency may be called upon to supervise but has no other role in that area.

Pretrial Diversion

Section 88. A New Section of KRS Chapter 533

1. The provisions of KRS 533.020 relating to the period of probation shall, in so far as possible, be applicable to the period of pretrial diversion except that supervision of the participants in the programs shall be done by the Division of Probation and Parole.

2. The provisions of KRS 533.030 relating to conditions of probation and restitution shall, in so far as possible, be applicable to pretrial diversion. Restitution shall be ordered in all cases where a victim has suffered monetary damage as a result of the alleged crime. Restitution to the state, or the victim, or both, may be ordered in any pretrial diversion program.

Section 89 - A New Section of KRS Chapter 533

1. If the defendant fails to complete the provisions of the pretrial diversion agreement within the time specified, or is not making satisfactory progress toward the completion of the provisions of the agreement, the Division of Probation and Parole, the victim, or a peace officer may inform the attorney for the Commonwealth of the alleged violation or noncompliance, and the attorney for the Commonwealth, may apply to the court for a hearing to determine whether or not the pretrial diversion agreement should be voided and the court should proceed on the defendant's plea of guilty in accordance with the law.

2. In making a determination as to whether or not a pretrial diversion agreement should be voided, the court shall use the same criteria as for the revocation of probation, and the defendant shall have the same rights as he or she would if probation revocation was sought.

Pretrial Diversion requires the involvement of the Commonwealth Attorney and the Court. The Division of Probation and Parole has no role until the decision is made, then these individuals will be supervised as any other probationer. It is understood that the person has not lost the right to vote or hold public office. However, with the court's approval, a provision will be imposed that no offender may carry or possess a weapon. This is for the officer's safety.

The probation officer will notify the Commonwealth Attorney of any violations, and it is up to the court and the Commonwealth Attorney to proceed with revocation, utilizing the same standards as for regular probation hearings. Once a person completes this program the charges will be listed as dismissed/diverted. That information will be included in any future Presentence Report.

The pretrial diversion statute allows the court to establish a diversion supervision fee to defray the cost to supervise. The Division of Probation and Parole will ask the court to impose a sliding scale based on the person's ability to pay.

Supervision Fee

Another area of change involving the collection of fees from offenders is the amount of the regular supervision fee. That fee language has been changed in the crime bill to read that a convicted felon may pay no more than $2,500 PER YEAR. The old language was $2,500 during the period of supervision.

Sex Offender Registration

Section 138 - KRS 17.510

If a person is required to register as a sex offender under federal law or the laws of another state or territory, or if the person has been convicted of an offense under the laws of another state or territory that would require registration under this section if committed in this Commonwealth, that person upon changing residence from the other state or territory of the United States to the Commonwealth or upon entering the Commonwealth for employment, to carry on a vocation, or as a student shall comply with the registration requirement of this section. As used in this subsection, "employment" or "carry on a vocation" includes employment that is full-time or part-time for a period exceeding fourteen (14) days or for an aggregate period of time exceeding thirty (30) days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit. As used in this subsection, "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade or professional institution, or institution of higher education.

Sex Offender Registration has brought changes. The federal government is attempting to standardize registration and notification procedures for all sex offenders. Probation and parole officers now must register all sex offenders when they report to the Probation and Parole office. Even though this process increases the officers' workload, it is important for the public's safety. Without the requirement for registration, the offender could have lived in Kentucky without anyone's knowledge. The sheriff will handle the issue of notification. That process will not be in place until December 1999.

Pre-Release

Section 119 - A New Section of KRS Chapter 439

1. There is hereby created a program for prerelease probation of inmates confined in correctional facilities under the jurisdiction of or under contract to the Department of Corrections.

2. Any inmate who is in a prerelease program or eligible for a prerelease program as specified by administrative regulations of the Department of Corrections may apply to the sentencing court for prerelease probation.

3. The court, upon favorable recommendation of the Department of Corrections, may place the inmate on probation under those terms and conditions the court deems necessary, which may include but not need to be limited to those specified in KRS 533.030.

4. In particular, the court may require that an inmate placed on prerelease probation remain in a halfway house approved by the Department of Corrections and that the probationer pay the cost of his or her lodging in the halfway house and the costs of probation supervision in accordance with applicable statutes for probation supervision and persons granted work release from jail.

5. An inmate placed on prerelease probation shall no longer be considered as an inmate of the Department of Corrections but shall be considered as a defendant placed on probation, subject to supervision by the Division of Probation and Parole, or other agency approved by the court, and the orders of the court.

6. A person placed on prerelease probation by the court who violates the conditions of his or her probation may be dealt with by the court in the same manner as any other person who violates the conditions of probation.

7. The period of probation under this section shall not exceed the maximum expiration date of the inmate applying for the probation.

The Department of Corrections is responsible for recommending to the courts persons who are eligible for prerelease programs. This in no way should be confused with the prerelease program that the Institutional Parole Officers conduct with inmates prior to meeting the Parole Board. A risk assessment instrument that was developed for the Parole Board by the National Institute of Corrections will be utilized as the basis for determining eligibility and program involvement. That July 14, 1998 policy is attached.

The Governor's Crime Bill encompasses a large part of the criminal justice system and will have many effects that are not yet obvious. However, it is known that probation and parole caseloads will greatly increase. Cooperation among the various criminal justice agencies is essential if we expect to be effective in protecting the citizens of this Commonwealth.

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[CPP #27-27-02 not reproduced - Please see paper edition - ed.]

Great works are performed not by strength, but by perseverance.
- Samuel Johnson


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The Advocate, Vol. 20, No. 5 (September 1998)

"Responsibility" and the Insanity Defense: Legal, Moral, or Psychological?

Recently, the highly regarded mental health law professor Chris Slobogin[1] made the following Internet inquiry:

> *I wonder if anyone agrees with this: (1) When a mental health professional testifies that someone is sane or insane, he or she is saying that the person should or should not be held responsible for the crime. (2) That conclusion is a legal/moral one about which the mental health professional has no "expertise" (as opposed to personal opinion). (3) Therefore, so testifying is a violation of the ethical rule that mental health professionals should not testify on matters beyond their competence.* [2]

We would disagree with this assertion, at least in the context of the courtroom use of mental health "expertise." Other contexts will be explored *infra*.

To use Kentucky law as an example:

> *"Insanity" means that, as a result of mental condition, [one lacks] substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law.* [3]

Furthermore, a person is "not responsible for criminal conduct" if he or she is determined to have been insane at the time that conduct occurred. [4]

When, as Professor Slobogin put it, "a mental health professional testifies that someone is sane or insane," that expert is not asserting that "the person should or should not be held responsible for the crime," but rather is concluding that the prerequisite condition for a legal finding of "criminal non-responsibility" [5] exists.

This perspective should not be confused with evasion of testimony as to the "ultimate issue," inasmuch as the determination of "sanity" is the very essence of such an issue.

If one were to subscribe to the reasoning outlined *supra*, forensic psychologists should decline to perform competency to stand trial evaluations because of insufficient "expertise" to determine whether a

profoundly mentally retarded defendant should stand trial in a court of law, and clinical psychologists should refuse to accept a psychiatrist's referral for an assessment of Depression, because of insufficient "expertise" to determine whether the patient should be treated with medication.

Consider how the argument Professor Slobogin described would fare when the law changes in a particular jurisdiction, such that persons who are "insane" are then to be tried for their criminal conduct.

Taken to its extreme, the perspective presented would obviate forensic mental health testimony altogether, due to mental health professionals' hopes that judges and juries will afford experts' opinions significant consideration in arriving at decisions of their own.

To examine this issue another way, there are eight progressive conclusions in the criminal responsibility calculus and its resolution:

1. *Clinical Conclusion*: Defendants suffered from a mental condition.
2. *Forensic Conclusion*: Defendants lacked substantial capacity either to appreciate the criminality of their conduct or to conform their conduct to the requirements of law.
3. *Forensic Conclusion*: The incapacit[ies] described in (2) resulted from the condition described in (1).
4. *Forensic Conclusion*: Defendants were "insane."
5. *Legal Conclusion*: We agree; defendants were "insane."
6. *Legal Conclusion*: Defendants who were "insane" are not criminally responsible.
7. *Legal Conclusion*: Defendants who are not "criminally responsible" shall not be tried.
8. *Legal Conclusion*: Defendants who are not "criminally responsible" shall be subject to involuntary civil commitment proceedings.

Forensic scholars are likely to argue about what combination(s) of (2), (3), and, in particular, (4) would constitute the stuff of testimony to the "ultimate issue." (6), (7) and (8) are conclusions of law, about which an expert need never be asked in order to elicit "ultimate issue" testimony. In fact, an expert's opinion in this regard would be irrelevant.

A legal conclusion regarding "sanity," and those subsequent thereto, all flow from, but do not equate with, a persuasive forensic conclusion.

If there is a compelling argument against the provision of "ultimate issue" testimony on the part of mental health professionals, we do not believe that the one described will suffice. In effect, it "skips over" the true "ultimate issue" controversy in its assumption that influencing a "legal" opinion and dictating its implementation are one and the same thing.

When mental health "expertise" is applied in other contexts, such as testimony to those "making" rather than "applying" the laws (*i.e.* legislators), the contours of the scientific role may change significantly. In this context, the scope of testimony will likely include the full range of psychological knowledge

(clinical, social, cognitive, experimental) instead of being limited primarily to one's area of practice specialization.

Over the years, the courts have attempted to utilize psychological science to define the laws regarding mental health issues. It may be argued that there has been a sea change in this relationship, as the implications of *Daubert* [6] become clearer all the time: It is now the judges who decide what has scientific merit, not scientists who guide interpretation of the law. Just as scientists once sat constructively on the bench, now the judges have arrived in the laboratory.

REFERENCES

[1] Professor Slobogin provides an eloquent and scholarly discussion of "ultimate issue" testimony in Melton, G., *et al.* (1997). *Psychological Evaluations for the Courts (2d Ed.)*. New York: The Guilford Press.

[2] PSYLAW-L@UTEPVM.UTEP.EDU , PSYLAW-L., 21 May 1998. Owners: Roy Malpass, Doug Narby (University of Texas - El Paso).

[3] KRS 504.060 (5).

[4] KRS 504.020 (1).

[5] *See*, for the initial application and delineation of this terminology, American Bar Association. (1989). *ABA Criminal Justice Mental Health Standards*. Washington: American Bar Association.

[6] *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993).

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The Advocate, Vol. 20, No. 5 (September 1998)

Defenders Celebrate on Behalf of Kentucky's Poor,and Single Out Advocates for Special Recognition

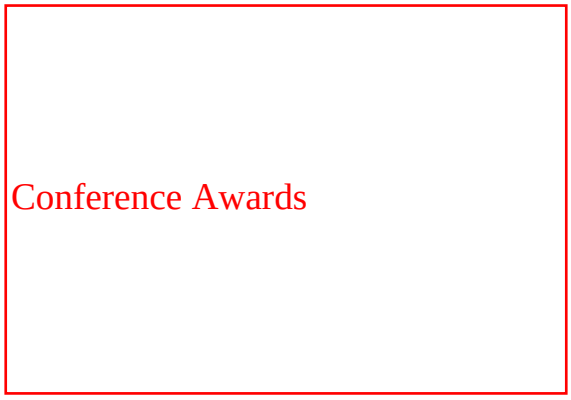
Over 350 people came to the 26th Annual Kentucky Public Defender Conference to celebrate the Department of Public Advocacy's (DPA) first year of the second quarter-of-a-century. The Conference was held at the *Holiday Inn North*, Lexington, Kentucky on June 15-17, 1998.

This conference offers workshops on post-conviction and appellate, juvenile and capital litigation as well as an opportunity to meet and associate with others locally and nationally who represent clients accused of crimes.

The attendees included public defenders and criminal defense attorneys from across the state. The Conference theme was: *Persuasive Defenses, Creative Negotiations, and Juvenile Litigation*. This is Kentucky's largest yearly gathering of defense advocates and it offers the state's greatest variety of criminal defense education.

Awards were presented at the conference recognizing some special people to our Kentucky defenders.

THE C J



The **Public Advocate Award** recognizes those who have uncommonly fostered fair and reliable process for those accused of or convicted of a crime. Lewis presented the first award to theperson recognized statewide "CJ." "And this is not Charles Johnson the basketball player. How many of us have any doubt who the CJ is in Kentucky? It is a great honor for us as public defenders, Chief Justice Stephens, for you to be here. Chief Justice Stephens is at the pinnacle of a long and productive career starting with private practice, Fayette County judge for five years, Attorney General for four years, Justice of the Supreme Court since 1979, served on the UK Board of Trustees, Senior Warden/Vestry member at Christ Church Episcopal in Lexington, and the CJ since 1982. Chief Justice Stephens has been an innovator and leader in Kentucky specifically in Kentucky's court system for some time. He led the campaign to form merged city-county government before he became part of the Supreme Court. He led the way on the use of videos

in our court system, led the way on the use of family courts, led the way on uniform rule making, led the way on gender and equity, led the way on the focus on domestic violence, led the way on KERA, and has attacked racism in our court system. Note the active use of the verb led because the CJ defines leadership in the state. He also brings to his job a gentle spirit and I will go back and look when I first became a public defender. The prosecutor at the time, the attorney general was Justice Stephens and my knee jerked quite quickly as he joined the Court and at the time it was verycommon for the Kentucky Supreme Court to criticize public defenders for fly specking the record among others and there was something of an adversarial feel about public defenders and the Courts. Not so with this Chief Justice. This Chief Justice exercised leadership in this area as well. Legitimating our roles as public defenders every time I ever heard him talk. He praised public defenders for the work that we do and I thank you Mr. Chief Justice for bringing us into the tent, making us feel welcome in the Bar, and even valued members of the Bar. He has been a friend of public defenders and Public Advocates. To quote Paul Isaacs, "During my tenure as state Public Advocate, Chief Justice Robert Stephens was a true friend to the Department of Public Advocacy. He supported the Department through his appointments to the Public Advocacy Commission by appointing people who were concerned and actively involved in improving the Department of Public Advocacy. To quote from Allison Connelly, a wonderful letter that she wrote on your behalf in one paragraph, " nevertheless what I find to be the most amazing trait about the Chief is that after all his years of public service to our state he has never become cynical. Rather, he remains a man with an inexhaustible capacity for enjoying life, who possesses unexpected sensibility and joviality placed with toughness. In short, he is one of a kind. He has taught all of us that as lawyers we can and must make positive contributions to people's lives. We will never forget the contributions he made to our system of justice. And Dan Goyette, notwithstanding the many accolades and awards Chief JusticeStephens has now received for his progressive leadership of the Court of Justice, we will not fully appreciate him until he has left the court. Certainly he has been a staunch supporter of a well-balanced and properly funded criminal justice system and in that respect he has been a friend and ally of the public defenders over the years up and unto and including the just completed session of the General Assembly. I have no doubt he will be sorely missed by the defender community. You have honored us as lawyers Mr. Chief Justice by your term on the Court, you have honored us as public defenders by your presence here tonight, and you have honored us as Kentuckians by the life that you have led. It is a pleasure to give you a Public Advocate's Award tonight."

CHIEF JUSTICE STEPHENS REMARKS

"If you talk much more, I won't be able to talk at all. Ernie, thank you. I was going to make a 20 minute speech but the new KBA President took my speech away from me. Seriously, I'm very grateful. The decision for me not to run was not an easy one. But 16 years is a long time in the saddle of running the court system in this state, I think, my successor, I think you will enjoy a good relationship with him. He's a very bright man, he's a very fair man, very hard working man, has all the right values. I disagree with him on some of his decisions but that's healthy and all part of the game.

Now, this award is very special to me, but I'm going to tell you. As in any case, for any individual, man or woman, there's always somebody else that is more deserving of it. And those of you that know me, know it's true. She's been with me all 16 years. She was just 10 when I employed her. She has been my

right arm, my advocate, but most importantly my social conscience, she's been there when I made policy decisions, she's been there when administrative decisions have been made involving this organization and some of the lawyers, and without letting any secrets out too much, she's been there even when some decisions were rendered. I'm talking, of course, about Susan Clary. Joe Lambert will do well to listen to you, Susan.

As has been said here tonight, much has been done, but there's much more to be done. I don't know what the future holds for me, I hope I do not retire from the world or retire from work but when I'm around in whatever capacity I end up, if I can help you in any way - I'm not a very good fund raiser, so don't ask me to do that - but in any way that I can help you to improve your lot, especially if you're in the legislative time, I'm here. All you have to do is call me and tell me a little bit of what you want and I'll make up the rest. I believe with all my heart now, as I believed many years ago, even as a prosecutor, every person deserves the representation of a competent lawyer who has the proper resources to defend him or her in criminal cases. John Rosenberg, I also believe the same is true in civil cases. It's been one of the benchmarks that I've tried follow as a judge and I shall follow if I ever go back to the practice of law. I want to tell all of you here tonight, you don't have to worry about me competing as a defense lawyer if you'll forgive and permit the pun, *"Strickland* speaking I would not be competent." Again, I thank all of you for all of the work you've done, all the love you've given for gross underpaid. Without you, to make our system at least a little bit towards the level playing field, our system, our democracy, our republic is too close to what it needs to be and what you have made it. Thank you so much.

***ROSA PARKS* AWARD**

The *Rosa Parks Award* was presented to **Father Patrick D. Delahanty**, Chair of the Kentucky Coalition Against the Death Penalty. Established in 1995, this award is presented to a non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. Father Delahanty was honored for his vision and passion and persistence on passage of the Racial Justice Act. Pat has taught defenders how to hope. Receiving his award, Father Delahanty said, "I am very pleased to be here this evening to accept this award from the Department of Public Advocacy. I accept it as a tribute not only for the work I have done, but also as a tribute to so many others who have worked and are working to end the death penalty in Kentucky and in the nation.

783 years ago today, King John of England signed the Magna Carta allowing the accused a trial by a jury of peers. This dramatic change in the administration f justice was one of the most important developments in the history of law. Yet, even this act, and the jurors, then and now, are only human. And they still make mistakes and reach wrong conclusions. The sad reality is that an innocent person's liberty - and in Kentucky, one's life - can be taken away by 12 mistaken peers.

Of course, liberty can be restored. Life cannot. And that's one of the chief reasons so many of us have concluded that the death penalty must be abolished and abolished as quickly as possible.

But, it will not disappear overnight, and so we must be prepared to do battle with this injustice for many years to come. This delay in achieving our goal should not overwhelm or dishearten us. Mohatma Ghandi did not lose heart when the British refused to leave India. Rather, he struggled all the more to see that it happened.

If, on November 30, 1955, you asked a black resident of Montgomery, Alabama if she thought she could ever ride on the bus and not have to give up her seat to a white man, she would have looked at you like you were crazy. One day later, the answer changed. And a year and 25 days later, the Supreme Court ruled that the city of Montgomery could no longer operate a segregated bus system.

Rosa Parks' action became the catalyst needed to ignite the modern civil rights movement.

It took more long years of protest, struggle and death to get Congress to pass and a President to sign important civil rights legislation. It has taken far longer to change the attitudes and the hearts and minds of many of our fellow citizens. The lynching of James Byrd in Jasper, Texas last week is a stark reminder of how far we have not come.

The continuous "serial murdering" of men, women and children by the people of our various states shows us how far we still have to go.

But, like Ghandi, Parks, Dr. Martin Luther King, Jr., and hundreds of others, we cannot and will not be deterred. We have ended the death penalty for mentally retarded persons in this State; we have passed the first law in this nation to address the blatant racism known to exist wherever the sentence of death is imposed; we will ultimately abolish this punishment entirely.

I really cherish the honor you bestow on me this evening because I have such deep respect for the work you do and I admire how you have chosen to use your skills and your time to defend the indigent, especially the condemned. Thank you very much.

In Re Gault

The *In Re Gault Award* was presented to **Kim Brooks**, Director of the Northern Kentucky Children's Law Center, Inc. This award honors the person who has advanced the quality of representation for juvenile defenders in the Commonwealth. Public Advocate Lewis inaugurated this award this year to emphasize the critical importance of the defense of our children.

In Re Gault Award

Ms. Brooks said she was deeply honored to be the first recipient of this important symbol of the value of enhancing representation of children.

Nelson Mandela Lifetime Achievement

Nelson Mandela Lifetime Achievement

The *Nelson Mandela Lifetime Achievement Award* was presented to **Col. Paul G. Tobin**, former Executive Director of the Jefferson District Public Defender's Office. Established in 1997, this award honors an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants.

Col. Tobin said, "I have some good news for those of you who have come to know me as being somewhat more than voluble… The good news is that I am truly speechless.

But, nevertheless, let me say without becoming maudlin that I am somewhat doubtful that I am worthy of this honor but appreciative that you should think I am. I hasten to add that were it not for the dedicated men and women who made up the team I was able to assemble I would not have realized the achievement I hoped for.

The *Nelson Mandela Lifetime Achievement Award*…named in honor of one whose very mention conjures up visions of perseverance over a lifetime dedicated to human rights… AND …isn't that what we Public Defenders are all about?

I have always viewed our Bill of Rights as being expressive of those freedoms all human beings should enjoy. It would be carrying coals to Newcastle for me to enumerate them to you - but I'm speaking, of

course, of speech, religion, assembly…and freedom from unreasonable search and seizure of property or person.

But the greatest - by far - is the right to counsel. That is because all those rights set out in the United States and Kentucky Bill of Rights are protected by and insured by the right to have competent counsel and the right to have that counsel heard.

I didn't receive a joyful reception in Louisville and it wasn't because I was an army colonel…no it was because I was going to be a Public Defender. One of my first experiences as a civilian was to be ushered into the presence of one of the criminal judges in Jefferson County and introduced as the new Public Defender. "HMF," his honor grunted, "what we need is a public defender!"

Ignoring the sarcasm, I simply agreed, "Yes, judge," I said, "what we need is a Public Defender - and now just maybe we'll experience a bit of justice here."

I don't think that got me started well with the judge but I am proud to say that's just what we accomplished: hearing the sounds of *Gideon's* trumpet and with *Bradshaw v. Ball* following we established an ethical aggressive team and proceeded to provide competent counsel to our clients, the economically disadvantaged, and thereby virtually eliminated the old "sugar bowl" appointment system.

A "sugar bowl appointment" was a bench appointment with concurrent license to look for a sugar bowl. If there was a sugar bowl with five or so dollars in it there might be some modicum of defense -- if there wasn't there would surely be a guilty plea irrespective of the facts.

Sometimes it took a trip to the U.S. Supreme Court - but nevertheless I believe the Public Defender has infused the system with a change of attitude respecting the criminal practice and has come pretty close to giving us that for which we strive -- JUSTICE FOR ALL."

The *Herald-Leader* Editorial Board

The Lexington *Herald-Leader* was presented with a Public Advocate's award for their coverage of the funding needs of Kentucky's public defender system and the Racial Justice Act and their editorial support of both of these. In accepting the award, Vanessa Gallman said, "It's very rare to be actually praised for anything…what makes this so heartwarming is that it shows for one time we were really on the side of the good guys."

Senator Gerald Neal

A Public Advocate's award was given to Senator Gerald Neal of Louisville for his tireless, courageous and skillful leadership on passage of the historic Kentucky Racial Justice Act, the first ever in the nation, and his value centered work in the General Assembly.

Senator Gerald Neal

"I wanted to come here tonight and acknowledge you and let you know how much I respect what you do. I hold you up in high esteem. The only reason this RJA happened is because of the coalition of people, many of whom I do not know who stepped up to support all the strategic efforts that we needed in a comprehensive and judicious way and I accept this award on their behalf."

Representative Jesse Crenshaw

Representative Jesse Crenshaw

Representative Jesse Crenshaw of Lexington was awarded a Public Advocate's award for shepherding the Racial Justice Act through the House of Representatives and his support of the Department's need for increased funds. Representative Crenshaw thanked the hundreds of people who helped mobilize legislators to vote for the Racial Justice Act, and asked that we mobilize to achieve the things KBA President Clay spoke on.

Gideon

The *Gideon Award* was presented to **Edward C. Monahan**, Deputy Public Advocate. Established in 1993, the *Gideon* award is presented to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the right to counsel for the poor in Kentucky. Ed observed how we all need each other in this work and how much spirit we all bring to this important work.

Representative Harry Moberly

A Public Advocate's award was bestowed on Representative Harry Moberly of Richmond for his special assistance to DPA in obtaining significant funding for Kentucky's urban and rural offices, especially for juvenile representation need. Representative Moberly said he was very proud to have the state public advocate from his legislative district. He talked of his days of representing indigent criminal defendants and his clear appreciation for the important, essential role we play in the criminal justice system.

Representative Kathy Stein

Representative Kathy Stein of Lexington was awarded a Public Advocate's award for sponsoring HB 337 for DPA and her work on behalf of indigent criminal defendant sin the House Judiciary Committee and on the floor. She said, it was a privilege to work as a Lexington public defender and to represent the under-served in the General Assembly working to make the playing field level.

Senator Ernesto Scorsone

A Public Advocate's award was given to Senator Ernesto Scorsone of Lexington for his leadership on criminal justice issues as chair of the Senate Judiciary Committee on the Governor's Crime Bill and HB 337. Senator Scorsone observed what a super job defenders did and what an excellent advocate Ernie Lewis is and how he has an incredible ability to really represent DPA's interests in the legislature. He talked of his experience as a public defender in 1976. He thanked defenders for what we do for the justice system and observed how essential our work is.

Jane Chiles

Jane Chiles, the executive director of the Kentucky Catholic Conference, which is the public policy arm of the Catholic Bishops, received a Public Advocate's award for her special advocacy for passage of the Racial Justice Act and for the interests of indigents in the Crime Bill and on funding for DPA. Ms. Chiles talked of how the justice system is a chain and is only as strong as the weakest link. She said it would be a disgrace if the Church did not take an active part in influencing legislation which shapes the justice system. "We are the voice for the voiceless."

Jane Chiles

Juvenile Post-Dispositional

Juvenile Post-Dispositional

Tim Arnold, Barbara Bingham, Lisa Clare, Kim Crone, and Donna Southard were specially honored for their remaining with the Juvenile Post-Dispositional Branch despite the problematic nature of the funding for that work unit.

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Retroactivity and the 1997 Changes to the Laws Affecting Juveniles

On July 15, 1997 a drastic change in the law concerning admissibility of juvenile adjudications took place. KRS 532.025 (1) (a) was amended to provide that "subject to the Kentucky rules of evidence" juvenile adjudications of guilt of offenses which would have been felonies if committed by adults are admissible at the penalty phase of a capital trial. Additionally, juvenile court records made available to the defense "may be used for impeachment purposes during a criminal trial and may be used during the sentencing phase of a criminal trial" with the exception that juvenile adjudications may not be used to find the child guilty of a persistent felony offender charge. KRS 532.055, the "truth in sentencing statute," now permits the Commonwealth to offer during the TIS hearing "juvenile court records of adjudications of guilt of a child for an offense that would be a felony if committed by an adult." Language comparable to that in 532.025 concerning admissibility of juvenile records for impeachment purposes is also included. See KRS 532.055 (2) (a) (6).

There is a very strong claim that application of this statute to adjudications which took place prior to 7/15/97 constitutes an *ex post facto* application of the law. KRS 635.040, which is still in effect, provides that "no adjudication by a juvenile session of district court shall be deemed a conviction, nor shall such adjudication operate to impose any of the civil disabilities ordinarily resulting from criminal conviction, nor shall any child be found guilty or be deemed a criminal by reason of such adjudication." At a juvenile adjudication, the guilt of the child is ordinarily determined either through a trial before the judge at which witnesses testify or by an admission by the child. Certainly, prior to 7/15/97, it is highly unlikely that a judge would have advised a juvenile who was admitting guilt that his admission might result in later serious consequences in adult court. A juvenile who has admitted guilt in juvenile court at a time when these negative consequences with respect to circuit court flowing from that admission did not exist has a strong claim that his admission may not properly be used against him either for impeachment purposes or for purposes of enhancing his sentence.

KRS 446.080(3) provides that "no statute shall be construed to be retroactive, unless expressly so declared." An argument can be made that allowing admission of juvenile adjudications which took place prior to 7/15/97 would constitute retroactive application of the law since new and unforeseen consequences would attach to the adjudications. The amendments to 532.025 and 532.055 were not declared to be retroactive and thus must be assumed to be prospective. The question which arises is the meaning of "prospective" in this context. Does "prospective" mean that juvenile adjudications are admissible at any trial which takes place after 7/15/97 whenever the adjudications occurred? Or does it mean that juvenile adjudications are admissible at trials which take place after 7/15/97 only if the adjudications occurred after 7/15/97?

"[T]he rule against the retroactive application of statutes should be strictly construed." *Peach v. 21 Brands Distillery*, 580 S.W. 2d 235 (Ky. App., 1979). Sections 2 and 11 of the Kentucky Constitution as well as Art. I, Section 10 of the United States Constitution are applicable. "The *Ex Post Facto* clause flatly prohibits retroactive application of penal legislation." *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). In determining whether a statute operates retroactively "the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id*. That is certainly the case with the amendments to 532.025 and 532.055 since admission of juvenile adjudications in circuit court is a new legal consequence attached to adjudications completed before 7/15/97. See also *Thompson v. Utah*, 170 U.S. 343, 351 (1898) which teaches that a statute comes within the constitutional prohibition of *ex post facto* laws when "by its necessary operation and in its relation to the offense, or its consequences, [the statute] alters the situation of the accused to his disadvantage."

There are many other possible grounds for challenging the admissibility of juvenile adjudications in circuit court, such as denial of the right to counsel and/or failure to comply with the requirements of *Boykin v. Alabama*, 395 U.S. 238 (1969). However, the threshold question is whether the amended statute is being applied retroactively.

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Good Lawyers

"There are not enough good lawyers; not enough competent lawyers; not enough caring lawyers, not enough lawyers willing to devote themselves fully to their clients. There are not enough prosecutors and District Attorneys who understand their power and use it fairly and wisely. There are not enough judges willing to be guided only by principles of fairness - unaffected by political expediency."

- Brendan V. Sullivan, Jr.

Looking at the Lawyer's Role in Racial Injustice

The Kentucky Bar Association's new president, Richard Clay, told a recent meeting of public advocates that one of his priorities would be a focus on racial discrimination in the justice system and in the law profession.

Clay, a Louisville civil lawyer, criticized the profession for not hiring enough minorities nor cultivating interest in the law among minority students.

Of the 12,500 member of the state bar, he estimated about 200 are black. Jefferson County has one black public defender; Fayette County has none.

It was a good speech, which pointed out a range of problems that Clay said would be addressed in a 1999 conference sponsored by the bar and the Kentucky Supreme Court.

It is encouraging to hear that legal minds will consider tackling even some part of such a big problem. We hope something constructive will come of it.

Even Clay warned that unless there is real commitment from the lawyers, the effort could fit in a category with many other conferences: "wonderful talk, marvelous studies, but precious little, if any, action."

Lexington *Herald-Leader* (June 27, 1998)

RJA HELP

The new Kentucky Racial Justice Act which prohibits seeking a death sentence on the basis of race became effective July 15, 1998. If you have a capital case and would like to consult with capital litigators on this issue in your case, contact one of the following people to schedule a case consultation:

George Sornberger (502) 564-8006, ext. 230
Margaret Case (502) 564-3948
Vince Aprile (502) 564-8006, ext. 107

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Profiles in Excellence & Professionalism

Tom Collins

> The essence of our work in quality is about the human spirit.
>
> - W. Edwards Deming

The DPA Workgroup on Professionalism & Excellence (P & E) identified the many aspects of professionalism and excellence in the work of DPA. This is the first in a series of profiles of those at DPA who exhibit P & E day in and day out.

Carrying a bulging trash bag, he had nevertheless managed to push the button for the elevator when I walked up. He just smiled when I asked if everybody hauled the garbage out as they left for the weekend. I knew he got the "cheap" joke. Riding down, I shared that I was from Georgetown and he said that he worked with juveniles. I held the outside door as he swung the load up to his shoulder, and we stepped together into one of those early March afternoons that makes us forget a Kentucky winter as quickly as a new mother forgets childbirth. I complained that it was after 5:00 p.m. and nobody should be working this late on such a fine day.

Actually I had enjoyed the effort of the afternoon as the workgroup wrestled to define professionalism and excellence. We had determined that such a culture would exist when every member of the organization is prepared and knowledgeable, when they are respectful and trustworthy, when they are supportive and collaborative. All of this was still pretty much in the abstract, and we hadn't yet determined how DPA could get there.

We turned in the same approximate direction in the parking lot so I slowed to keep pace. He asked if Highway 460 around Georgetown was open yet. Finally curiosity got the better of me, and I asked him just what he was carrying off. He sort of quietly admitted that he was taking a kid in a detention center his stuff. "Sometimes there is just so little we can do. It's hard to remember how important having personal belongings is to a young person who has lost all control over his life. This may be the only shred of dignity he has."

Tom Collins defined professionalism and excellence in a very concrete way for me that afternoon. He affirmed that the essence of our work in quality really is about the human spirit.

Alma Hall, Ph.D.
Professor, Georgetown College
Alma Hall led the efforts of the DPA Workgroup on Professionalism & Excellence.

The Juvenile Branch of DPA was created in 1996 as the result of a consent decree between juveniles in the Commonwealth's residential treatment centers and the Commonwealth to provide representation to juveniles committed to the Department of Juvenile Justice (DJJ) as public or youthful offenders. These juveniles were being denied access to the courts by the Commonwealth's failure to provide counsel for them while they were committed to the Commonwealth. With the consent degree, the Commonwealth agreed to provide a system of legal services, including routine face to face contact with attorneys, at each of the 12 residential treatment facilities operated by DJJ. The Juvenile Branch represents the confined youth on fact, duration and conditions of confinement issues arising from federal statutory or constitutional rights.


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Redefining the Mission in the Post-Conviction Branch

Beginning July 1, 1998, the Department of Public Advocacy Post-Conviction Branch redirected its efforts towards a newly defined mission. Court-appointed RCr 11.42 and court-appointed CR 60.02 cases have become the responsibility of the DPA Post-Conviction Branch. Any remaining Post Conviction Branch resources shall be devoted to continuing the branch's role in helping Corrections fulfill its obligation to provide "access to the courts" to incarcerated adult felons.

To accomplish this mission, the state has been divided into three regions. The western region will be covered by Hank Eddy, Gordon Rahn and a soon to be hired attorney located in the DPA Eddyville office. The eastern region will be covered by Tim Riddell, Linda West and Joe Myers located in the Frankfort office. The central region shall be covered by Marguerite Thomas, Post-Conviction Branch Manager, Ed Gafford and Brian Ruff, from the LaGrange Post-Conviction office. Contracts with private counsel will be used as needed.

When private defense attorneys do represent DPA post-conviction clients, DPA in-house staff will serve as resources to the contractors. This assistance could encompass obtaining records, interviewing witnesses, assisting in accessing clients, or being available for case review.

Under the DPA Post-Conviction Branch Plan each of the 9 post-conviction attorneys will spend a portion of their time on the court-appointed cases. Remaining attorney time will be dedicated to direct representation of post-conviction litigation that arises from prison-intake interviews, representing clients referred by of-counsel and in-house appellate staff and upgrading information packets on those matters wherein DPA staff cannot provide direct representation.

All circuit court judges have been asked to send court appointments to Marguerite Thomas, the Post-Conviction Manager in Frankfort.

The leadership of DPA has redefined the mission of the Post-Conviction Branch both to improve the quality of services that DPA provides in all court-appointed RCr 11.42 cases and reduce the caseload of an overburdened trial delivery system. To ensure quality representation, the DPA Post-Conviction Branch is committed to the following:

1. Case review.

2. Personal contact with all RCr 11.42 clients.

3. Developing a system for obtaining client files from trial lawyers.

4. Utilizing support staff to secure necessary court records and other records and relying upon the assistance of the Trial Division where possible.

5. Establishing a case tracking system that identifies wins and losses.

6. Ensuring that post-conviction staff receive necessary education such as the DPA Fall Litigation Institute where litigation skills are taught.

7. Assisting contractors with case review, obtaining records and accessing clients.

8. Maintaining communication with clerks to ensure proper records are timely forwarded to DPA.

In addition to handling the court-appointed RCr 11.42 and CR 60.02 cases, the Post-Conviction Branch staff will be handling RCr 11.42 cases that arise in a facility and are approved by the Post-Conviction Branch Manager, post-conviction staff will also provide attorneys for state habeas cases, federal habeas, belated appeals, special parole revocation hearings and *Vitek* hearings. In all other matters including in-state detainers, sentence calculations, early parole requests, shock probation and institutional issues, informational packets will be available at the facilities. These packets have been developed by the Post-Conviction Branch staff to assist prisoners who must proceed *pro se*..

The Post-Conviction Branch still has the authority and responsibility for handling appropriate RCr 11.42 and CR 60.02 cases that have been identified through DPA paralegal interviews with incarcerated persons. Many of the people incarcerated in our prisons cannot read or write and many have mental illnesses that prohibit them from helping themselves. Thus, without the assistance of the Post-Conviction Branch staff, many would not have the capacity to file a *pro se* action requesting the appointment of counsel. Additionally, several RCr 11.42 cases have been investigated by the Post-Conviction Branch staff throughout this past year. Pleadings in these cases will be filed by post-conviction attorneys after July 1st.

To ensure the success of the Post-Conviction Branch's newly defined mission, it is critical that we have ongoing communication between the Trial Division and the Post-Trial Divisions, between the courts and DPA, and between the Department of Corrections and DPA. The Post-Trial Division and the Post-Conviction Branch have received helpful advice from the Trial Division and from several circuit court judges. Post-conviction staff are in constant communication with the Department of Corrections to improve our representation of clients. Dialogue on how best to provide representation to incarcerated persons has been helpful to clarifying our mission. Should anyone have questions concerning DPA post-conviction cases, please contact Marguerite Thomas, Post-Conviction Branch Manager, at (502) 564-3948 or Rebecca DiLoreto, Post-Trial Division Director, at (502) 564-8006, #279.

Rebecca Ballard DiLoreto

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Full-Time Public Defender Office Opens in Bell County

(Frankfort, KY, August 18, 1998) - The Department of Public Advocacy (DPA) announced the conversion of the public advocacy program in Bell County from part-time to full-time attorneys. The office will be headed up by **Cotha Van Doren** of Pineville, who has been serving as the part-time contract public defender in Bell County since 1994. Cotha remarked, "I am delighted to be a part of this leap into the 21st Century. Bell County has long deserved an increase in the number of public defenders available for our citizens who cannot afford to hire an attorney. Thanks to the efforts of Ernie Lewis, Michael Bowling, and many other people my staff and I will have an opportunity to meet the prosecution head-on." The office is responsible for representing all poor people accused of a crime in Bell County. In the last fiscal year (July 1, 1996 - June 30, 1997) the Bell County Public Defender Program represented 943 clients, 88 in circuit court and 834 in district court. Since July 1, 1997, 1360 clients (1,074 in district court, 150 juveniles, 136 in circuit court) have been represented in circuit and district court. Bell County brings to 52 the number of counties covered by full-time DPA offices.

Public Advocate, **Ernie Lewis**, who has a goal of providing 85% of DPA's clients with representation by full-time defenders, spoke about the importance of Bell County now being served by a full-time office, "I am excited about the opening of our 20th full-time office. This will significantly improve the delivery of services in Bell County, as well as move DPA toward our goal of providing full-time services in 85% of our trial level cases."

Roger Gibbs, of London, Kentucky, Eastern Regional Manager for DPA, welcomed the newest full-time office. "We are excited about the future of client service in Bell County. This is one of the busiest dockets we have and this office will go a long way towards meting the needs of the people in this area."

Middlesboro attorney, **Michael Bowling**, who chaired Kentucky's House of Representatives' Judiciary Committee, commented on the opening of the Bell County Public Advocacy office, "I am very pleased that DPA chose Bell County to open a full-time office. It's been badly needed. I look forward to assisting them however I can."

BELL COUNTY BECOMES 52ND COUNTY
COVERED BY FULL TIME PUBLIC DEFENDERS

Bell
County

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KY Department of Public Advocacy

How to Contact Public Advocacy

Main Frankfort Office
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Phone (502)564-8006
Fax (502)564-7890
Field Offices

Appeals		#107	
Capital Post-Conviction	Joyce Hudspeth	#332	Joyce.Hudspeth@ky.gov
Capital Trials		#131	
Computers	Ann Harris	#130	AnnW.Harris@ky.gov
Eastern Region	Scott Richard	#282	Scott.Richard@ky.gov
Frankfort Region	Andy Forester	#258	Andy Forester@ky.gov
Western Region	Fortune Royce	#280	Fortune.Royce@ky.gov
Contract Payments	Ruth Schiller	#188	Ruth.Schiller@ky.gov
Education	Lisa Blevins	#294	Lisa.Blevins@ky.gov
Frankfort Trial Office	Rodney Barnes	(502) 564-7204	RodneyD.Barnes@ky.gov
General Counsel Office	Lisa Blevins	#294	Lisa.Blevins@ky.gov
Juvenile Post-Dispositional Unit	Edward Clark	#220	Edward.Clark@ky.gov
Law Operations	Karen Scales	#111	Karen.Scales@ky.gov
Library	Will Geeslin-Librarian	#120	Will.Geeslin@ky.gov
	Library Asst.	#119	Kimberly.Cribbs@ky.gov
Payroll/Timesheets	Beth Roark	#136	BethC.Roark@ky.gov

Human Resources	Alfred Adams	#116	AlfredG.Adams@ky.gov
Post-Trial Division	Jessie Luscher	#310	Jesse.Luscher@ky.gov
Properties	Larry Carey	#218	Larry.Carey@ky.gov
Protection & Advocacy	Lou Ann Brooms	(502) 564-2967 OR #276	LouAnn.Brooms@ky.gov
Public Advocate's Office	Shannon Means	#108	Shannon.Means@ky.gov
Recruiting	Karen Scales	#111	Karen.Scales@ky.gov
Travel Vouchers	Ruth Schiller	#188	Ruth.Schiller@ky.gov
Trial Division	Sherri Johnson	#165	SherriL.Johnson@ky.gov

Updated: September 21, 2004

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Kim Allen to Head Kentucky Criminal Justice Council

Justice Cabinet Secretary Dan Cherry announced on July 15, 1998 the appointment of Kim Allen, of Louisville, as the executive director of the Kentucky Criminal Justice Council.

The Council was established by Governor Patton's criminal justice legislation, House Bill 455, which was passed by the 1998 Kentucky General Assembly.

"We are thrilled to have Kim in such an important position, and with her extensive background in criminal justice planning, we are expecting major results," Cherry said. "As head of the Council, she will help ensure that the criminal justice system is responding to crime as a system and not on a piecemeal basis."

The council will be comprised of 28 members from various sectors of the criminal justice system and all three branches of government. It will advise the Governor and the Legislature on criminal justice matters.

The council has been directed by HB 455 to review and make recommendations on the administration of justice, the rights of crime victims, sentencing issues and the penal code.

The council is to develop model programs, conduct comprehensive planning, disseminate information on crime issues and trends, make appropriate legislative recommendations, conduct an in-depth assessment and study of criminal gangs and make recommendations thereon, and study the concept of involuntary civil commitment of sexual predators.

Allen has been on the staff of the Louisville/Jefferson County Crime Commission since 1984 and served as Executive Director since 1988. She ahs a master's degree in justice administration from the University of Louisville and a master's in clinical psychology from Spalding University. Allen presently serves as chair of the executive committee for the National Association of Criminal Justice Planners and was appointed by Governor Patton to serve on the Governor's Council on Domestic Violence in 1996.

The provisions of HB 455 that relate to the Criminal Justice Council are:

Section 1. KRS 15A.030 is amended to read as follows:

The Justice Cabinet, in addition to the departments set forth in KRS 15A.020, shall consist of the following organizational units which are hereby created or reestablished:

(1) Office of secretary of justice comprised of the secretary of justice, the Commission on Correction and Community Service, the Kentucky State Corrections Commission, and the ***Criminal Justice Council***~~[Kentucky Crime Commission]~~. The Parole Board shall be attached to the Office of the Secretary for administrative ***and support*** purposes only.

(2) Offices of deputy secretaries of justice.

(3) Office of the general counsel.

(4) Medical examiner service program.

Section 2. KRS 15A.040 is amended to read as follows:

(1) The ***Criminal Justice Council***~~[Kentucky Crime Commission]~~ shall advise and recommend to the ***Governor and the General Assembly***~~[secretary]~~ policies and direction for~~[departmental]~~ long-range planning regarding all elements of the criminal justice system***. The council shall review and make written recommendations on subjects including but not limited to administration of the criminal justice system, the rights of crime victims, sentencing issues, capital litigation, a comprehensive strategy to address gangs and gang problems, and the Penal Code. Recommendations for these and all other issues shall be submitted to the Governor and the Legislative Research Commission at least six (6) months prior to every regular session of the Kentucky General Assembly. The council shall:***

(a) Make recommendations to the justice secretary with respect to the award of state and federal grants and ensure that the grants are consistent with the priorities adopted by the Governor, the General Assembly, and the council;

(b) Conduct comprehensive planning to promote the maximum benefits of grants;

(c) Develop model criminal justice programs;

(d) Disseminate information on criminal justice issues and crime trends;

(e) Work with community leaders to assess the influence of gangs and the problems that gangs cause for local communities, assist local communities in mobilizing community resources to address their problems, sponsor multidisciplinary training to help communities focus on proven strategies to address gang problems, and conduct an ongoing assessment of gang problems in local communities;

(f) Recommend any modifications of law necessary to insure that the laws adequately address problems identified in local communities relating to gangs;

(g) Provide technical assistance to all criminal justice agencies; and

(h) Review and evaluate proposed legislation affecting criminal justice; and

(i) All reports and proposed legislation shall be presented to the Interim Joint Committee on Judiciary not later than July 1 of the year prior to the beginning of each regular session of the General Assembly ~~[and shall exercise supervisory authority with respect to federal and state grants as required by federal or state law]~~.

(2) ~~[Total]~~Membership of the ***Criminal Justice Council shall consist of the following:***

(a) The secretary of the Justice Cabinet or his designee;

(b) The director of the Administrative Office of the Courts or his designee;

(c) The Attorney General or his designee;

(d) Two (2) members of the House of Representatives as designated by the Speaker of the House;

(e) Two (2) members of the Senate as designated by the President of the Senate;

(f) A crime victim, as defined in KRS Chapter 346, to be selected and appointed by the Governor;

(g) A victim advocate, as defined in KRS 421.570, to be selected and appointed by the Governor;

(h) A Kentucky college or university professor specializing in criminology, corrections, or a similar discipline to be selected and appointed by the Governor;

(i) The public advocate or his designee;

(j) The president of the Kentucky Sheriffs Association;

(k) The commissioner of state police or his designee;

(l) A person selected by the Kentucky State Lodge of the Fraternal Order of Police;

(m) The president of the Kentucky Association of Chiefs of Police;

(n) A member of the Prosecutors Advisory Council as chosen by the council;

(o) The Chief Justice or a justice or judge designated by him;

(p) One (1) member of the Kentucky Association of Criminal Defense Lawyers, appointed by the president of the organization;

(q) One (1) member of the Kentucky Jailer's Association appointed by the president of the organization;

(r) One (1) member of the Circuit Clerk's Association;

(s) Three (3) criminal law professors, one each from the University of Kentucky College of Law, the Louis D. Brandeis School of Law at the University of Louisville, and the Salmon P. Chase College of Law at Northern Kentucky University, to be selected and appointed by the Governor;

(t) One (1) District Court Judge, designated by the Chief Justice;

(u) One (1) Circuit Court Judge, designated by the Chief Justice;

(v) One (1) Court of Appeals Judge, designated by the Chief Justice;

(w) One (1) representative from an organization dedicated to restorative principles of justice involving victims, the community, and offenders; and

(x) One (1) individual with a demonstrated commitment to youth advocacy, to be selected and appointed by the Governor~~[Kentucky Crime Commission and the appointment of members thereto shall be determined and made by the Governor]~~.

(3) The secretary of justice shall serve ex officio as chairman of the ***council***~~[commission]~~. ***Each member of the council shall have one (1) vote.*** Members of the ***council***~~[commission]~~ shall serve without compensation, but shall be reimbursed for their expenses actually and necessarily incurred in the performance of their duties.

(4) The council shall meet at least once every three (3) months.(5) The council may hold additional meetings:

(a) On the call of the chairman;

(b) At the request of the Governor to the chairman; or

(c) At the written request of the members to the chairman, signed by a majority of the members.

(6) Two-thirds (2/3) members of the council shall constitute a quorum for the conduct of business at a meeting.

(7) Failure of any member to attend two (2) meetings within a six (6) month period shall be deemed a resignation from the council and a new member shall be named by the appointing authority.

(8)The council is authorized to establish committees and appoint additional persons who may not be members of the council as necessary to effectuate its purposes, including but not limited to:

(a) Uniform Criminal Justice Information System committee;

(b) Committee on sentencing; and
(c) Penal Code committee.

(9) The council's administrative functions shall be performed by a full-time executive director appointed by the secretary of the Justice Cabinet and supported by the administrative, clerical, and other staff as allowed by budgetary limitations and as needed to fulfill the council's role and mission and to coordinate its activities.

Section 3. A New Section Of Krs Chapter 17 Is Created To Read As Follows:

(1) There is hereby established the Kentucky Unified Criminal Justice Information System, referred to in this chapter as the "system." The system shall be a joint effort of the criminal justice agencies and the courts. Notwithstanding any statutes, administrative regulations, and policies to the contrary, if standards and technologies other than those set out in KRS 61.940 to 61.953 are required, the Commonwealth's chief information officer shall review, expedite, and grant appropriate exemptions to effectuate the purposes of the unified criminal justice information system. Nothing in this section shall be construed to hamper any public officer or official, agency, or organization of state or local government from furnishing information or data that they are required or requested to furnish and which they are allowed to procure by law, to the General Assembly, the Legislative Research Commission, or a committee of either. For the purposes of this section, "criminal justice agencies" include all departments of the Justice Cabinet, the Unified Prosecutorial System, Commonwealth's attorneys, county attorneys, the Transportation Cabinet, the Cabinet for Human Resources, and any agency with the authority to issue a citation or make an arrest.

(2) The program to design, implement, and maintain the system shall be under the supervision of the uniform criminal justice information system committee of the Criminal Justice Council. The

membership of this committee shall be determined by the council, upon the recommendation of the Governor's chief information officer, who shall chair the committee.

(3) The committee shall be responsible for recommending standards, policies, and other matters to the secretary of justice for promulgation of administrative regulations in accordance with KRS Chapter 13A to implement the policies, standards, and other matters relating to the system and its operation.

(4) The committee shall submit recommendations to the Criminal Justice Council and the secretary of justice for administrative regulations to implement the uniform policy required to operate the system. The committee shall implement the uniform policy.

(5) The uniform policy shall include a system to enable the criminal justice agencies and the courts to share data stored in each other's information systems. Initially, the uniform policy shall maximize the use of existing databases and platforms through the use of a virtual database created by network linking of existing databases and platforms among the various departments. The uniform policy shall also develop plans for the new open system platforms before the existing platforms become obsolete.

(6) The committee shall be responsible for recommending to the Criminal Justice Council and the secretary of justice any necessary changes in administrative regulations necessary to implement the system. The committee shall also recommend to the Criminal Justice Council, the Chief Justice, and the secretary of justice recommendations for statutory additions or changes necessary to implement and maintain the system. The secretary shall be responsible for reporting approved statutory recommendations to the Governor, the Chief Justice, the Legislative Research Commission, and appropriate committees of the General Assembly.

(7) The chair of the committee shall report annually to the Criminal Justice Council on the status of the system.

(8) All criminal justice agencies shall follow the policies established by administrative regulation for the exchange of data and connection to the system.

(9) The committee shall review how changes to existing criminal justice agency applications impact the new integrated network. Changes to criminal justice agency applications that have an impact on the integrated network shall be coordinated through and approved by the committee.

(10) Any future state-funded expenditures by a criminal justice agency for computer platforms in support of criminal justice applications shall be reviewed by the committee.

(11) Any criminal justice agency or officer that does not participate in the criminal justice information system may be denied access to state and federal grant funds.

> The weak can never forgive. Forgiveness is the attribute of the strong.
> - Mahatma Gandhi


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The Advocate, Vol. 20, No. 5 (September 1998)

When It Can't Wait For Appeal: What To Do In An Emergency

[*This is the first of three parts of this article dealing with ways to obtain immediate review by another court of injurious actions taken by the judge in the case that is being prosecuted. This first installment lists the types of relief available and examines the jurisdiction of the various courts to grant relief. The next article will deal with the mechanics and practical aspects of seeking relief pursuant to CR 81 or CR 76.36 actions commonly called writs of prohibition or mandamus. These are the most often sought forms of relief and merit separate discussion. The third installment of this article will deal with the remaining forms of relief and will conclude with an appendix of important original action cases for future reference.]*

The Court of Justice is charged by Sections 2, 14 and 115 of the Constitution to provide effective appellate review of all actions of its judicial officers. In almost all cases the Supreme Court deems appeal after the entry of final judgment adequate to discharge this duty. [*Graham v. Mills*, Ky., 694 S.W.2d 698, 699-700 (1985)]. In fact, the key requirement to establish jurisdiction for original actions brought under CR 81 or CR 76.36 is the inadequacy of appeal as a sufficient remedy. [*Adventist Health Systems v. Trude*, Ky., 880 S.W.2d 539 (1994)]. There are practical and theoretical reasons underlying this rule.

The best practical reason was given by the late Justice Leibson during the course of an oral argument when he said that a court should not intervene before final judgment because the problem might go away on its own or be rendered moot by later actions. In more concrete terms, this means that the defendant might be acquitted or convicted of a less serious charge that would obviate an appeal after judgment. The defendant might plead guilty under RCr 8.08 or 8.09. Later developments might show that the judge's ruling wasn't so wrong after all. a less legitimate reason, and a rarely stated one, is that the trial might produce overwhelming evidence of guilt such that an error that might seem grave in isolation before trial would be rendered harmless and disposable under RCr 9.24 afterward.

The theoretical reason is that the "higher" courts of the Court of Justice should not micro-manage the proceedings of "inferior" courts. Each trial court has a grant of original jurisdiction under the Constitution. [Sections 112(5); 113(6)]. The people of the judicial district, by voting for the judge, have expressed faith in the judge's ability. As an elected officer, each judge necessarily has a grant of constitutional authority which should be exercised independently.

The theoretical and practical premises of the appeal after final judgment policy dovetail nicely with the circumstances in which the Court of Justice finds itself these days. The latest information I have shows that the Supreme Court dealt with over 1000 cases last year while the Court of Appeals received 3300 new filings. Spread among 7 and 14 judges respectively, this is quite a heavy load. In Jefferson County,

and probably in other circuits, each circuit judge averages 600 to 800 open cases at a time. Obviously, any policy that might make an appellate action go away is bound to seem right to courts operating under these conditions.

Please do not misunderstand what I am saying. The appeal from final judgment rule has been the law from time out of mind. It will be applied in almost all cases because it is the law and it is the custom handed down to the current crop of judicial officers in Kentucky. But these other circumstances are background information that you need to know and understand when you try to buck the established order of proceedings by an original action of some kind. Inertia will favor application of the wait-and-hope-it-goes-away approach. But, if you also understand the reasons that justify an original action and pick the cases in which you file original actions wisely, you can get relief for your client. As a by-product you will demonstrate to the judge who did you wrong that you don't mind taking a bad ruling up and that you can get something done about it.

There are some fundamental points that should be taken care of at the start. The first of these points is that there is no such thing as a writ of prohibition or a writ of mandamus in Kentucky. You will read cases decided as recently as 1997 that speak about writs of prohibition or mandamus. However, in July 1953 the authority of the circuit court to grant these specific remedies was abolished by the repeal of the old Civil Code and the adoption of CR 81. The right of the old Court of Appeals "to issue such writs as may be necessary to give it general control of inferior jurisdictions was repealed as of January 1, 1976 and replaced by current Sections 109 and 110(2)(a) of the Constitution which create the Court of Justice as a "unified judicial system for operation and administration" under the supervision of the Supreme Court which "shall have the power to issue all writs ... as may be required to exercise control of the Court of Justice."

Under the Judicial Article of the Constitution, neither the Circuit Court nor the Court of Appeals has inherent original jurisdiction to entertain actions which seek to govern the rulings of inferior courts. The Court of Appeals is limited by Section 111(2) of the Constitution to issuance of writs only to "aid its appellate jurisdiction." The Circuit Court has original jurisdiction only over those matters "not vested in some other court." [Section 112(5)]. Supervisory jurisdiction, which is what we are talking about here, is lodged exclusively in the Supreme Court by Sections 109 and 110(2)(a).

CR 81 and CR 76.36 cannot be construed to give jurisdiction to any court. They are procedural rules that tell litigants how to proceed when an original action is authorized. They cannot be "construed to extend or limit the jurisdiction of any court of this Commonwealth ...". [CR 82].

Thus, the first and ostensibly the only basis for the Court of Appeals or the Circuit Court to entertain original actions of this type is by delegation from the Supreme Court. This is accomplished by SCR 1.030(3) and 1.040(6). These rules authorize "proceedings in the nature of mandamus or prohibition" against a circuit or district judge respectively.

Jurisdiction to entertain an original action brought pursuant to CR 81 or CR 76.36 is delegated by the

Supreme Court to the Court of Appeals or to the Circuit Court. The power delegated is the power to exercise control over the Court of Justice. Thus, it is not necessary to worry too much about the type of relief you ask for when filing an original action. The Supreme Court has the authority under the Constitution to review and correct any action by any judicial officer anywhere in the Commonwealth of Kentucky. If properly brought to the attention of the Supreme Court, the actions of a trial commissioner or of the Chief Justice may be corrected by original action either in the Supreme Court or, by delegation, in the Court of Appeals or the-Circuit Court. This has been recognized by the Supreme Court in two fairly recent cases, *Abarnathy v. Nicholson*, Ky., 899 S.W.2d 85 (1995) and *Kuprion v. Fitzgerald*, Ky., 885 S.W.2d 679 (1994).

In theory, then, anything that a judge does that harms your client in a way that cannot be corrected on appeal is subject to an original action of one kind or the other. The principle of judgment in such cases is whether the actions violate an already known policy of the Court of Justice or a policy that should be established. Basically, the argument is that the Supreme Court, simply as a matter of policy, decided that something should or should not be done. As we will discuss in later sections of this article, the Supreme Court delegates authority through various individuals and bodies, including chief judges and local rule-making authority. But for right now, it is sufficient to know that the main source of jurisdiction for original actions is the Supreme Court's supervisory authority which amounts to what a majority of the Supreme Court thinks is the right way to run a court system.

Although the Judicial Article of the Constitution does not give the Court of Appeals or Circuit Court inherent authority to govern the actions of lower court judges, there is an alternative line of authority for review growing out of Sections 2 and 14 of the Bill of Rights. This has been called, in other circumstances, the right of inherent review. This right grows out of Section 2, which is unique among state constitutions. [*Reis v. Campbell County Board of Education*, Ky., 938 S.W.2d 880, 887 (1996)]. Section 2 prohibits arbitrary conduct by any agent of government. This necessarily includes judges. In *Kentucky Milk Marketing Commission v. Kroger*, Ky., 691 S.W.2d 893 (1985) the Supreme Court stated this principle: "If the action taken rests upon reasons so unsubstantial or the consequences are so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected." Obviously, this means interposition at a time when it will do some good. This conclusion is strengthened by Section 14 of the Constitution which requires the Court of Justice to provide prompt, effective remedies for legal injuries. The Court of Justice is bound by Sections 2 and 14 of the Constitution to provide some form of relief before the injury occurs or becomes irreparable. Together, these provisions create a right of the individual to seek relief, and, a corresponding jurisdiction to grant relief. The relief available under either approach is not limited to what formerly were called "writs of prohibition or mandamus".

You might observe that there is no great need to worry about what I call "jurisdiction from necessity" in light of the wide ranging supervisory jurisdiction that was discussed above. You rarely will have to deal with it in an ordinary original action. But it is important when time constraints, which are both the prime reason that you can seek intermediate relief (stay orders) and the chief impediment to getting it, are working against you because you cannot get to the judge next higher in the table of organization. Sections 2 and 14 allow you to jump that level or go to a different judge on the same level because the

Court of Justice must always be open for business and must afford a timely opportunity to seek relief.

It is impossible to deal with the practice of original actions without understanding the third type of jurisdiction which arises from the organization of the Court of Justice for purposes of administration and operation. The Judicial Article adopted in 1976 took away from the General Assembly the power to regulate local practice by means of statute and in its stead established a system of local and regional judges through which the Supreme Court could manage the Court of Justice. If you look in the front of any recent Kentucky Decisions book you will see in the list of circuit court judges a designation of chief regional judge after some names. The regional administration program was established pursuant to Sections 110(5)(b) and 112(4) of the Constitution. The chief regional judge is responsible primarily for personnel matters. However, the regional program delegates to the chief regional judge the "judicial assignment authority" given to the Chief Justice by Section 110(5)(b) of the Constitution. This is authority to assign any judge temporarily to any court other than the Supreme Court. The only requirement for exercise of the authority is the chief regional judge's belief that "such assignment [is] necessary for prompt disposition of causes." Thus, if you are having trouble with the local circuit or district judge, it may be possible to apply to the chief regional judge to have your case reassigned. The authority to do so is there, and it is available simply upon a request to the judge. It may be an alternative to a traditional original action.

In addition to the regional judge plan, each local unit, district or circuit, has a chief judge who is the Supreme Court's agent in the district. Section 112(4) and Section 113(3) and (4) of the Constitution establish the position of chief judge who "shall exercise such authority and perform such duties in the administration of his district as may be prescribed by the Supreme Court." SCR 1.040(3) sets out the general duties of a chief judge and allows some supervision of the actions of other judges in that particular circuit or district. In cases where you might be justified in seeking relief because a judge is violating local rules or because the matter falls under the authority of the chief judge, you again simply apply to the chief judge for relief. Typically actions involving the chief regional or local judge will deal with local policies that may conflict with general policies set out in Supreme Court rules or operating procedures. [*e.g. Brutley v. Commonwealth*, Ky., 967 S.W.2d 20 (1998)]. Cases involving such administrative matters do not come up that often. But you should keep in mind that there is an alternate "administrative" jurisdiction that does not necessarily involve filing a legal action to seek relief for your client.

The relief available under the general heading of "original action" falls into 6 general categories. The first I call straight original actions, which are the typical "writs" which everyone speaks about. However, there are also administrative original actions that can be taken to either the chief judge, or, in certain circumstances, directly to the Supreme Court. There are also statutory actions available. Habeas Corpus under KRS Chapter 419 is available when the client is entitled to immediate release for some reason or other. Under certain circumstances, a declaratory judgment may be sought under KRS Chapter 418. For certain cases, it is possible to apply to the chief regional or local judge for relief. In cases where a circuit court client has been given an unreasonable bond, it is possible to accomplish the same result as an original action by prosecuting an RCr 4.43 appeal and seeking intermediate relief under CR 76.33 in the Court of

Appeals. The approach you take depends on the case and on the venue where you believe you're most likely to accomplish the result you have in mind.

Of the installments of this article I consider this one the most important. It is easy enough to show someone how to file an original action. It is much more difficult to explain why and where an action should be filed if a lawyer does not have a good grasp of the sources of jurisdiction and what the Supreme Court wants done in its court system. The bottom line still is that appeal after final judgment is the preferred remedy. It is only when the litigant can demonstrate an irreparable harm that the "orderly progression" of litigation should be upset. In the next section, we will examine more closely the jurisdictional requirements and begin examination of typical scenarios in which the orderly progression of litigation must-be upset.

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Capital Case Review - Julia Pearson

Julia Pearson

KENTUCKY SUPREME COURT

***Sanborn v. Commonwealth*,**
(decided June 18, 1998)
975 S.W. 2d 905 (as modified on rehearing 10/15/98)
Majority: Wintersheimer (writing), Stephens, Lambert, Johnstone, Graves, Cooper, Stumbo

After Parramore Sanborn's convictions and resentence to death were affirmed in 1994, he filed a motion pursuant to RCr 11.42 in the Jefferson Circuit Court. That motion was overruled in October, 1996.

Prejudgment of IAC Claim

After the trial, the court both praised and criticized the Department of Public Advocacy counsel who had represented Sanborn. During post-conviction, defense counsel sought to disqualify the special judge who sat because of those statements. The majority found no error, saying that the statements were inconsistent and did not indicate prejudgment. The trial court had said that it would hear all the evidence before it made a final judgment.

There was also no error in denial of the motion to recuse the judge. He was applying the legal standards of *Strickland v. Washington*, 466 U.S. 668 (1984), to the case before him.

Meaningful Preparation and Presentation of Issues

Defense counsel had adequate time to prepare the RCr 11.42 motion. Sanborn's conviction was affirmed on October 27, 1994; nearly a year later, the United States Supreme Court denied certiorari. On January 3, 1996, 122 days after denial of cert., Governor Patton signed a death warrant authorizing Sanborn's execution on February 1, 1996. Sanborn's RCr 11.42 motion was filed on March 26, 1996, and the evidentiary hearing was held on August 12 and 13 of that year. Thus, Sanborn had more than ten months to file motions in preparation for the hearing.

Furthermore, counsel could not with specificity identify witnesses, evidence or claims which would have been presented had a postponement of the hearing been granted. *Sanborn*, slip opinion at 5, citing RCr 9.04.

Sanborn's argument that he was not provided funding before filing his motion was meritless. Circuit courts do not have jurisdiction regarding "pre-RCr 11.42 motions." *Id*., at 5, citing *Bowling v. Commonwealth*, 926 S.W.2d 667 (Ky. 1996).

There is no authority for using *ex parte* motions for funding in post-conviction cases. *Ake v. Oklahoma*, 470 U.S. 68 (1985), was a trial case which dealt with the right to a psychiatric examination. RCr 7.24 relates to pretrial discovery, not to discovery in post-conviction actions.

The purpose of RCr 11.42 motions is to provide a forum for known grievances, not for a fishing expedition for grievances. *Id*., citing *Gilliam v. Commonwealth*, 652 S.W.2d 856 (Ky. 1983).

Government Misconduct

All of the matters contained in this section of Sanborn's 11.42 were known to defense counsel prior to or at the time of retrial and should have been raised on direct appeal. The audiotapes of witness interviews which the first prosecutor claimed he had destroyed were found and available to defense counsel at retrial. The jury was told that organic material found on the victim's body had not been preserved. Moreover, the jury heard testimony about the significance of that material and about Sanborn's inconsistent stories.

There was no evidence that the police were continuing their investigation; the allegation that the police failed to disclose that information was meritless.

Arguments regarding jury misconduct were conclusionary. Sanborn's allegation about jurors discussing the case lacked specificity and indications of where, when and among whom such discussions occurred. *Id*., at 9. Likewise, his allegation that a juror was sleeping did not contain the specific facts necessary to support the claim as required under RCr 11.42(2).

Ineffective Assistance Of Counsel

When reviewing an ineffective assistance of counsel claim, the court must examine the totality of the evidence before the judge and jury and assess trial counsel's overall performance in order to rebut the presumption that trial counsel was effective. The movant must also show that there is a reasonable probability that but for counsel's errors, the outcome of the trial would have been different. *Id*., citing *Strickland*, *supra*.

The physical and circumstantial evidence pointing to Sanborn's guilt was overwhelming.

Sanborn's claim that counsel failed to use defense experts was not specific. His allegation that one of his defense counsel had a conflict of interest because she took the prosecution's voir dire noteswas rejected on direct appeal. The complaint that Sanborn had a poor relationship with his trial counsel should have been raised on direct appeal.

Counsel's limited concessions of Sanborn's guilt in order to argue for lesser-included offenses was reasonable trial strategy. *Id.*, at 11.

The record refuted the allegation that defense counsel failed to prepare for the introduction of evidence of extreme emotional disturbance. Counsel had Mr. Sanborn evaluated, and obtained a court order requiring the expert's presence at the Commonwealth's evaluation.

The claim that defense counsel was ineffective by conceding that the expert's opinion concerning the triggering event was based solely on his conversations with Sanborn and was unsupported by other evidence was meritless. The expert testified that he found nothing to support Mr. Sanborn's statements. Moreover, the trial court found that the expert had great experience from many criminal cases.

Trial counsel's testimony at the RCr 11.42 hearing refuted the allegation that he had not prepared Mr. Sanborn for the prosecution expert's evaluation. Trial counsel testified that he discussed the doctor's testimony, that he had a copy of the report, and that he had discussed the defense with Mr. Sanborn before the doctor examined him.

Barclay Brown

Prior to the first trial, defense counsel had enlisted Rev. Barclay Brown as a possible mitigation witness. Brown testified for the prosecution at the second trial, a fact which the trial judge noted in his decision to agree with the jury's death sentence. During post-conviction, counsel argued that first trial counsel were ineffective for not anticipating that Brown's discussions with Mr. Sanborn would be ruled unprivileged. "Failure to anticipate correctly a future ruling of the court does not present an ineffective assistance claim." *Id.*, at 14.

Tamme v. Commonwealth,
(decided March 19, 1998)
973 S.W. 2d 13 (as modified on denial of rehearing Sept. 3, 1998)
Majority: Cooper (writing), Wintersheimer, Johnstone, Graves
Minority: Stumbo (writing), Stephens, Lambert

After his convictions and death sentences for the murders of Neal Maddox and Harold Southerland were overturned in 1988, Frank Tamme was retried and resentenced to death in 1994. Tamme's accomplice, William Buchanon, was allowed to make an *Alford* plea and received 20 years probated for five years.

Speedy Trial

Tamme argued that his constitutional right to a speedy trial was violated by the more than five year delay between reversal and retrial. The Court examined the four *Barker v. Wingo*, 407 U.S. 514 (1972) factors in its decision. Tamme did not file a motion for speedy trial, but had filed a *pro se* motion to dismiss for failure to provide a speedy trial. A motion for bail pending retrial was denied. The Court found that such a motion was not an unequivocal demand for a speedy trial. *Tamme*, slip opinion at 4, citing *McDonald v. Commonwealth*, 569 S.W.2d 134 (Ky. 1978).

Although Tamme was prejudiced by the fact that he was jailed for the intervening five years, the reasons for delay were not the result of state act. The original judge and the first special judge both recused themselves from the case. The second special judge resigned for health reasons. The Commonwealth took an appeal from the third judge's order to supply Tamme's defense with Buchanon's current address. Three years after reversal, the third trial judge died and a fourth had to be appointed. Venue was changed from Washington County to Fayette County, and new defense counsel entered appearance. None of the above prevented Tamme from presenting evidence at the second trial.

Judicial Recusals

Tamme argued that the first trial judge should not have recused himself, and that the fourth, who ultimately tried the case, should have. The first trial judge recused himself because he did not believe he could impose the death penalty in a case where an accomplice had received a probated sentence. The trial judge made the proper decision. *Id*., slip opinion at 6, citing KRS 26A.015(2)(a) and (e).

During a hearing on second counsel's motion to withdraw, information about money to be given to witnesses by persons close to Tamme caused the fourth trial judge to wonder if he were tainted. Tamme did not request a recusal at that time. The Court found neither judge's decision clearly erroneous. *Id*., at 7.

Discovery Issues

Tamme argued that he was unable to discover exactly what consideration Buchanon had given for his plea agreement. The Court found that Tamme had never specifically requested the information, and that Tamme knew at the time of the agreement before the first trial that Buchanon was to cooperate and testify against Tamme.

In 1990, as part of discovery, Tamme asked for and received the polygraph examiner's case notes and the questions and responses used. He did not receive the polygraph charts. Because none of the polygraph evidence was admissible at trial, Tamme was not prejudiced because he did not receive the charts. *Id*., at 8, citing *Morgan v. Commonwealth*, Ky., 809 S.W.2d 704 (1991).

Jury Selection Issues

At the beginning of trial, the judge refused to admonish the jury that Tamme's indictment was not

evidence of his guilt. The jury was so admonished in the written instructions. Although the Court felt the issue had "merit", it did not find reversible error, in part because defense counsel was able to explain the function of an indictment to the jury.

During group *voir dire*, the judge inquired whether any venireman had read or heard anything about the case, or discussed it with anyone. The prosecutor asked a similar question, and defense counsel read both witness lists to the jury. Because no juror replied affirmatively to the questions, individual voir dire was not needed. Because of the length of time between the murders, first trial and the second trial, the Court felt it was not unusual that no venireman had heard of the case.

Three jurors were excused for cause because of their views regarding the death penalty. The judge was correct in his decisions: one juror was reluctant to impose death; the second did not "think" she could do so; the third had conscientious concerns about the death penalty so strong that they would conflict with the law.

The court correctly overruled Tamme's motion to excuse seven other jurors for cause. The first had done research on the death penalty, but held no bias in favor of it. The second was reluctant to impose the minimum penalty, but could consider the full range of penalties. The third and fourth were confused about the role of the indictment in the criminal process, but the third said she would comply with the court's instructions; the fourth said he had not heard the evidence yet, but did presume that Tamme was innocent. The last three jurors had concerns about mitigating evidence, although all three finally stated that they would consider both mitigating and aggravating evidence. *Id*., at 11-12.

Another juror was not excused, although she said she had vacation plans starting about two weeks into the trial. At the conclusion of the guilt phase, but before deliberations, the juror was excused; thus, any error in her selection was waived.

The trial court refused to grant defense counsel extra peremptories. Although the court did ask defense counsel to file an affidavit stating grounds for his request, no affidavit was filed. No abuse of discretion occurred.

At the beginning of trial, the jury was admonished not to read press reports pertaining to the trial. Although an article was published during the trial mentioning that Tamme was being retried after his first death sentence was reversed, the trial court did not poll the jury regarding whether anyone had read the article. The court had admonished the jury beforehand; there was no need to make further inquiries. Publication of a newspaper article does not create the presumption that the jury had violated its admonition. *Id*., at 14, citing *People v. Marshall*, 919 P.2d 1280 (Cal. 1996).

Witness Issues

The judge denied defense counsel's request that each witness be admonished to stay within the evidentiary boundaries established by the court, saying that such an admonition was the attorneys'

responsibility, and that his responsibility was to rule on objections if a witness strayed from his boundaries. Although the court told counsel that the motion could be renewed if circumstances changed, no new request was made. Thus, no error occurred.

During direct, the prosecutor asked leading questions of several witnesses. The majority noted that the trial was lengthy and that witnesses were testifying to events of eleven years previous. Tamme contended that asking such questions was prosecutorial misconduct. Although use of leading questions was generally unacceptable prior to adoption of KRE 611(c), that rule states that although such questions should not be used in direct examination, they may be used "as necessary to develop the witness' testimony." *Id*., at 16, citing KRE 611(c). No error resulted.

Forensic anthropologist Dr. David Wolfe testified at the first trial, but died in the interim between the first trial and the second. The trial judge informed the jury that Dr. Wolfe was deceased, and had his testimony read into the record. The court did not err in informing the jury that Wolfe was dead, not that he was only unavailable. The court also did not err in having one prosecutor read questions and another read Dr. Wolfe's responses while sitting in the witness chair. Such format enables jurors to understand testimony as it is read to them. The Court also noted that the same prosecutor who read Dr. Wolfe's responses was not the same prosecutor who was examining most witnesses and who delivered the closing argument.

The Commonwealth impeached both of Tamme's alibi witnesses by asking the number of his felony convictions, not just whether he had been convicted of a felony. The Court found no error; the Court noted that no contemporaneous objection was made, although the Court found this unsurprising since defense counsel asked William Buchanon, the chief prosecution witness, the same question.

During cross-examination, Tamme was asked about the origins of *pro se* pleadings he had filed. Tamme said the pleadings had been prepared by an inmate legal aide. the Court sustained an objection to the reference, but overruled an objection to the statements on relevancy grounds. The Court found that the evidence was relevant to prove that Tamme was intelligent and educated, and not just a "poor farmer."

Tamme was also asked whether William Buchanon and three other witnesses had lied. While the court did not approve of asking one witness to characterize the testimony of another, there was no objection to the question. The Court was "unpersuaded that absent this inquiry, the result would have been different." *Id*., at 20, citing *Cosby v. Commonwealth*, 776 S.W.2d 367, 3269 (Ky. 1989).

Tamme was also asked whether he knew of a motive Buchanon and another witness would have to testify against him. Tamme's claim that the question was unfair because the prosecutor knew Tamme could not reveal that Buchanon's motive was his belief that Tamme had cheated him out of over $50,000 worth of marijuana was not preserved. Since he answered that he had refused to post bond for Wilson and that he had refused to help Buchanon pay off a debt, the court found no harm.

Alibi Witness Perjury

After reversal, Tamme filed a motion for new trial based on the newly discovered testimony of an alibi witness, Harold Glidewell. Glidewell testified at a hearing on the motion that he and Tamme had been in Indiana on the day of the murders, and that Buchanon had told him that he (Buchanon) had murdered Maddox and Southerland. The Commonwealth established that Glidewell had not been in Indiana, but in the Barren County Jail on the day of the murders. He later pled guilty to perjury. At the second trial, on cross-examination, Tamme testified that Glidewell had testified, that his testimony was false, and that Glidewell had been convicted of perjury. On appeal, Tamme claimed that introduction of that evidence was improper impeachment through use of a specific instance of conduct.

The Court found that although a witness's credibility may be attacked, such entitlement is limited by CR 43.07 and by caselaw. KRE 608 does not specifically prohibit such impeachment, but neither is it authorized. However, the Court found that the evidence was relevant because it was inconsistent with Tamme's innocence. *Id*., at 24, citing *McQueeney v. Wilmington Trust Co*., 779 F.2d 916 (3d Cir. 1985) ("One who believes his own case to be weak is more likely to suborn perjury than one who thinks he has a strong case, and a party knows better than anyone else the truth about his own case.") Moreover, the fact that Tamme called Glidewell and remained silent while Glidewell perjured himself also created an inference that "Glidewell simply did not come out of the woodwork (or the Barren County Jail)to commit perjury. . .out of the goodness of his heart." *Id*., at 27. Lastly, the evidence was more probative than prejudicial.

Other Evidence

The Commonwealth introduced evidence that Norma Southerland, widow of one of the victims, was pregnant with Tamme's child, that she had purchased a revolver a month before her husband disappeared, that she obtained a restraining order against her mother-in-law after the disappearance, that she received her husband's life insurance benefits and did not attend his funeral. Defense counsel did not object to any of the evidence.

At the first trial, evidence that Tamme was involved in cultivating marijuana and cocaine trafficking was introduced to prove Tamme's motive for killing Maddox and Southerland. The Court disagreed, stating that the evidence "tended to prove some sort of jealous-lovers scenario, not a drug deal gone sour." *Id*., at 36, quoting *Tamme v. Commonwealth*, 759 S.W.2d 51 (Ky. 1988). At the second trial, the Commonwealth's theory was that Tamme's motive was related to his affair with Norma Southerland. Evidence regarding Norma Southerland's pregnancy resulted in a child she named "Frank" was relevant. Evidence regarding the purchase of the revolver contradicted her testimony that the gun was a birthday gift from her dead husband. There was evidence that Norma Southerland got the restraining order to prevent her mother-in-law from calling whether there was any new evidence regarding Harold Southerland's disappearance. Receipt of the life insurance proceeds was found relevant to motive. The fact that Norma Southerland did not attend her husband's funeral supported the Commonwealth's theory that she and Tamme were having an affair. *Id*.

Instructions

On appeal, Tamme asserted that he was entitled to an instruction on Manslaughter First Degree because the jury could have found that the "triggering event" was his desire to retaliate against Harold Southerland for beating his wife, and Tamme's paramour. The Court did not find justification for such an instruction: Norma Southerland testified that she did not tell Tamme that her husband beat her, and Tamme did not testify that he knew about the beatings. Moreover, justification for such an instruction is found "only 'when there is probative, tangible and independent evidence on initiating circumstances'". *Id*., at 42, quoting *Morgan*, *supra,* and *Wellman v. Commonwealth*, 694 S.W.2d 696, 697-98 (Ky. 1985).

There was also no evidence that an instruction on wanton murder or manslaughter were needed. There was no evidence that Tamme unintentionally killed either Southerland or Maddox. Both were shot in the head. *Id*.

Tamme's request for a penalty phase instruction on the mitigating circumstance of being an accomplice was properly denied. Such an instruction is proper only when participation is "'relatively minor'." There was no evidence that anyone other than Tamme was the triggerman.

Dissent by Justice Stumbo

Justice Stumbo wrote that she disagreed with the majority's opinion on the Glidewell perjury and the polygraph issue.

Buchanon testified that he had been interviewed at the London State Police Post for a polygraph. Prior to his testimony, defense counsel had been concerned that Buchanon might refer to inadmissible evidence. Buchanon's statement must be considered in the totality of the circumstances: he was the Commonwealth's main witness, as the prosecutor acknowledged in his opening statement. Buchanon's statement could easily have led the jury to infer that he had taken a polygraph. The fact that Buchanon was the Commonwealth's star witness leads to the logical conclusion that he had passed the examination, and was truthful.

When considered in conjunction with the Glidewell issue, the prejudice is even more pronounced. The majority relied upon *Foley v. Commonwealth,* 942 S.W.2d 876, 887 (1997), in which the court stated that attempts to suppress testimony or convince a witness to swear falsely were admissible of evidence tending to demonstrate guilt. However, in *Foley*, the person whom Foley was accused of intimidating testified at trial and accused Foley of doing so. In his own testimony, Foley attacked the credibility of that witness and opened the door for his own cross-examination.

In contrast, Glidewell did not testify for or against Tamme. The Commonwealth also did not seek to prove that Tamme was involved in anyway with Glidewell's testimony and subsequent conviction for perjury.

Because *Tamme* essentially involved a swearing match between Tamme and Buchanon, "even marginally

relevant evidence" is important in reaching a verdict. The jury did not have facts or physical evidence; its only evidence "the intangible factor of which witness seemed to be telling the truth." *Id.*, at 5.

***BOWLING V. COMMONWEALTH*,**
964 S.W.2d 803 (decided February 19, 1998)

MAJORITY: Cooper (writing), Stephens, Lambert, Wintersheimer, Johnstone, Graves, Stumbo

Ronnie Bowling's convictions of murder and robbery and sentences of death were affirmed on April 24, 1997. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997). His petition for certiorari to the United States Supreme Court was denied on November 18, 1997. *Bowling v. Kentucky*, 118 S.Ct. 451 (1997). On November 21, 1997, Governor Patton signed a warrant authorizing Bowling's execution on December 23, 1997. On December 1, 1997, defense counsel filed a Motion for a Stay of Execution and two other motions in the Laurel Circuit Court. The circuit court denied all the motions because of lack of jurisdiction on December 15, 1997.

The trial court correctly concluded that it did not have jurisdiction to hear the motions. A court loses jurisdiction over a case ten days after entry of the final judgment, and reobtains jurisdiction only upon filing of a proper RCr 11.42 or CR 60.02 motion, or a petition for a writ of state habeas corpus under KRS 439.020. *Bowling*, slip opinion at 2, citing *Thomas Bowling et al. v. Commonwealth*, 926 S.W.2d 667, 669-70 (Ky. 1996).

In this appeal, Bowling asserted that the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), which, in part, requires that petitions for writs of habeas corpus be filed not more than one year after conclusion of direct review affected the rights of Kentucky's governor to set execution dates in death penalty cases. *Id.*, citing 28 U.S.C. 2244 and KRS 431.218. Bowling argued that the language in the amendment created a grace period of one year in which to file for post-conviction relief, which prevented the state executive from setting an execution date.

However, the court found that interpretation "directly contradicted" one of the purposes of the AEDPA, which was to prevent delay and abuse in death penalty cases. Moreover, the amendment of §2244 affects only federal habeas corpus proceedings, and is akin to the three-year statute of limitations found in RCr 11.42(10). Thus, § 2244 does not affect either the time-limit found in RCr 11.42(10), nor the governor's ability under KRS 431.218 to set an execution date.

***O'Guinn v. Dutton*,**
88 F.3d 1409 (6th Cir. 1996)

Majority: Merritt, Martin, Jones, Milburn, Nelson, Ryan and Moore joining Concurrence: Merritt (writing), Jones
Minority: Boggs (writing), Siler and Batchelder
Batchelder (writing), Kennedy, Boggs, Norris, Suhrheinrich, Siler

Kenneth Wayne O'Guinn was convicted of the murder and aggravated rape in the Tennessee state courts. After filing his federal habeas corpus petition and utilizing federal discovery procedures, O'Guinn learned for the first time that possibly material documents had not been turned over to defense counsel before-trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). O'Guinn amended his habeas petition to include this claim. The district court granted his petition, which a three-judge panel of the Sixth Circuit reversed. *See O'Guinn v. Dutton*, 42 F.3d 331 (6th Cir. 1994), *vacated*, 42 F.3d 359 (6th Cir. 1995); *The Advocate*,

The *en banc* court decided that O'Guinn's petition must first be entertained in the Tennessee state courts because of the nature of the claims. "O'Guinn's *Brady* claim involves the conduct of a state prosecutor (in particular, his decisions regarding the withholding of evidence) in a state trial in which the defendant was prosecuted for violating state law." *O'Guinn v. Dutton*, 88 F.3d 1409, 1413 (6th Cir. 1996). Thus, even if *Granberry v. Greer*, 481 U.S. 129 (1987), did not provide a presumption in favor of returning mixed petitions to the state courts, O'Guinn's claims present an appropriate opportunity to do so.

Concurrence

Judge Merritt, who sat on the panel and again on the *en banc* decision, wrote separately to note his concerns about the case because "regardless of O'Guinn's guilt or innocence, he is entitled to a fair trial and vigilant protection of his constitutional rights. He received neither in this case " because the errors were egregious. *Id*., 88 F.3d at 1414.

Weak Evidence To Convict

"[T]he few pieces of evidence pointing to O'Guinn are of questionable reliability. No physical evidence tied O'Guinn to the victim or the murder scene. Only two eyewitnesses saw O'Guinn with the victim on the night of the murder. Danny Dunn, one of the eyewitnesses, who is illiterate and has mental problems, described the man he was with the victim as being 6'4", with a medium build. O'Guinn is 5'9" and weighed about 190 pounds at the time of the murder. However, the description does fit several regulars at the Hat & Cane, a Jackson, Tennessee, bar where Sheila Cupples was last seen alive. Dunn described the man as a stranger, but had only been a regular at the bar for the three weeks prior to the murder. *Id*., at 1415.

The other eyewitness, Diana King Pitsenbarger, was a waitress at the bar and gave a statement only after her own arrest two years later. However, she recanted her statement and trial testimony several years later. She testified at O'Guinn's habeas hearing that she lied at trial because the police had threatened to arrest her on unrelated charges and because she believed she would be helped with her own criminal trouble if she cooperated. *Id*., at 1416.

O'Guinn confessed to the murder, only after "forty-two days of interrogation, numerous interrogations by at least three law enforcement officers from two states, without the benefit of legal counsel, and in a

weakened physical state due to illness". *Id.*

Moreover, the text of O'Guinn's statements doe snot fit with the information known to police. Information "matched" what the police knew only in the broadest terms. When O'Guinn was pushed to give details, that information was invariably at odds with the facts of the case. For example, O'Guinn said that Ms. Cupples was wearing a blue long-sleeved shirt, even though the facts showed that she was actually wearing a pink halter top. *Id*. In short, the police led and coaxed O'Guinn to give much of his "statement". The only physical evidence at the scene which did not come from the victim were three brown hairs which did not match Kenneth O'Guinn's. *Id*.

Tennessee Post-Conviction Act

In 1995, the Tennessee legislature passed a new Post-Conviction Act, which replaced the one then in existence. The new act provides that "'relief may be granted 'when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee of the Constitution of the United States.'" *Id*., at 1418, citing Tenn. Code Ann. §40-30-203. It also changed the definitions of "waived" and "previously determined". *Id*., citing Tenn. Code Ann. §40-30-206(g); (h).

Brady Claim

In *Kyle's v. Whitley*, 115 S.Ct. 1555 (1995), the Supreme Court held that when a court is presented with a *Brady* claim, it must assess the collective effect the withheld evidence had in light of the evidence presented at trial. In this case, the weakness of the state's evidence makes it likely that had the withheld evidence been presented to the jury, reasonable doubt may have been created. *Id*., 88 F.3d at 1419.

Defense counsel were led to believe that they had obtained the entire file from the prosecution, and had no reason to believe otherwise. Had counsel known about that evidence, it is likely that their trial focus would have shifted. As it was, the withheld evidence prevented counsel from effectively cross-examining or possibly impeaching certain witnesses. "Here the collective effect of the withheld evidence, particularly when juxtaposed against the relatively weak evidence at trial, undermines confidence in the guilty verdict." *Id*.

IAC Claim

One of the number of claims the Tennessee Court of Appeals rejected on "waiver" or "previous determination" grounds was O'Guinn's ineffective assistance of counsel claim. However, this decision is not supported by the record; in its order denying O'Guinn's first state post-conviction pleading, the trial court affirmatively stated that defense counsel had not been ineffective. The Tennessee Court of Appeals dealt only with the issue of whether O'Guinn's Alabama pre-trial counsel had been effective. *Id*., at 1423.

However, the record does support the fact that defense counsel was ineffective at sentencing. Counsel's total failure to investigate O'Guinn's background and discover the wealth of easily available mitigating

evidence satisfies both *Strickland v Washington*, 466 U.S. 668 (1984), requirements: 1) deficient performance; 2) prejudice as a result.

Boggs Dissent

Judge Boggs wrote that he saw "no indication that the investigative and discovery tools that developed the material allegedly supporting the *Brady* claim" did not exist during either of O'Guinn's state court proceedings. *Id*. In fact, only after the Sixth Circuit panel reversed O'Guinn's grant and "plac[ed] O'Guinn on a direct track toward execution" and *en banc* argument had been granted, did counsel "dr[a]w another arrow from their quiver" by raising the *Brady* claim. Even then, O'Guinn did not request dismissal of the habeas action, but attempted to maintain "the best of both worlds". If *en banc* argument went well, then O'Guinn would succeed on the merits. However, if it did not, O'Guinn could then argue that the entire process should be remanded to the state courts. *Id*., at 1431.

The *Granberry* opinion did not even contemplate the sort of situation O'Guinn placed the Sixth Circuit in: the habeas petitioner himself seeking remand to the state courts to adjudicate issues he failed to raise in the state courts. Thus, Boggs found that the procedures employed in this case are "completely contrary to [*Granberry's*] language and intent." *Id*.

Batchelder Dissent

Batchelder felt that the court could examine the *Brady* claim, particularly because the district court had conducted a full hearing on it. Numerous witnesses testified, and two bound volumes of documents accompanied an affidavit by trial counsel. O'Guinn himself said that no further evidence was to be introduced. *Id*., 88 F.3d at 1435.

Because the State of Tennessee had never requested dismissal of the petition so the state courts could have first crack at the *Brady* claim, the court cannot be said to have interfered with the administration of justice in the state courts if it heard the habeas petition. O'Guinn chose to file the habeas petition with the *Brady* claim; he could have presented it to the state courts first.

She then examined the *Brady* claim under the criteria for materiality of evidence set forth in *Kyles v. Whitley*, 115 S.Ct. 1555: 1) whether, in the absence of the undisclosed evidence the defendant received a fair trial worthy of confidence in the verdict; 2) a showing that the favorable evidence could reasonably have put the case in such a different light that confidence in the verdict is undermined; 3) no need for harmless-error review after a finding of error; and 4) collective consideration of the evidence. *Id*., at 1436; citing *Kyles*, 115 S.Ct. at 1566-1567.

Viewed as a whole, the undisclosed evidence, which consisted of statements from witnesses at the Hat and Cane the night of Sheila Cupples' murder, was not material. under the *Kyles* standard. Two witnesses who had given statements were found "'completely incredible'" by the district court. *Id*., at 1437. Leads from information given by other witnesses were followed up by investigators. None of this information

was strong enough to undermine the import of O'Guinn's confessions, and therefore, would not reasonably have put the case in a different light. *Id*., at 1439.

Ineffective Assistance Of Counsel

After an "exhaustive review" of the record, Batchelder felt that O'Guinn's allegation of ineffective assistance of counsel was procedurally

defaulted. Counsel admitted that the issue was not raised in O'Guinn's first state post-conviction pleading. The argument that because the court *sua sponte* ruled that counsel had been effective did not bring into play *Harris v. Reed*, *supra*, cause and prejudice analysis's "untenable." *Id*., 88 F.3d at 1449. Under the Tennessee post-conviction procedure then in existence, "waiver" was defined as a knowing and understanding failure to present a claim in a court where the ground could have been presented. *Id*., 1449, citing Tenn. Code Ann. §40-30-112 (1990).

O'Guinn's claim that he had cause for not timely raising the claim because his post-conviction counsel was ineffective also fails. There is no constitutional right to counsel in post-conviction proceedings, nor is there a right to effective counsel in those proceedings. *Id*., 1452, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Coleman v. Thompson*, 501 U.S. 722 (1991). Thus, the only examination the court can undertake is whether O'Guinn is "actually innocent" of the death penalty. *Id*., 88 F.3d at 1452, citing *Murray v. Carrier*, 477 U.S. 478 (1986); *Sawyer v. Whitley*, 505 U.S. 333 (1992). However, O'Guinn cannot show by "clear and convincing evidence" that no reasonable juror would have found him eligible for the death penalty. *Id*., citing *Sawyer*, 505 U.S. at 348.

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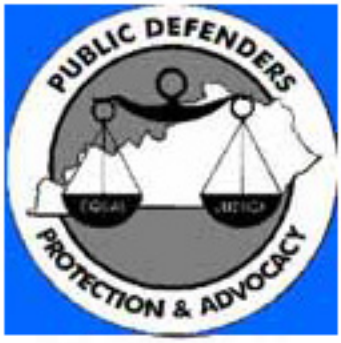

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